



ST. MARY'S  
UNIVERSITY

St. Mary's Law Journal

---

Volume 5 | Number 4

Article 5

---

12-1-1973

## Creditors' Post-Judgment Remedies in Texas.

Student Symposium

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Securities Law Commons](#)

---

### Recommended Citation

Student Symposium, *Creditors' Post-Judgment Remedies in Texas.*, 5 ST. MARY'S L.J. (1973).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol5/iss4/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

# STUDENT SYMPOSIUM

## CREDITORS' POST-JUDGMENT REMEDIES IN TEXAS

### TABLE OF CONTENTS

INTRODUCTION .....	716
THE GARNISHMENT PROCESS ..... <i>George Ann Miller</i>	719
<i>Property Subject To Garnishment</i> .....	722
<i>Property Exempted From Garnishment</i> .....	727
PROCEEDINGS IN GARNISHMENT ..... <i>Michael J. Noonan</i>	731
<i>Conditions For The Issuance Of The Writ</i> .....	732
<i>Application For The Writ</i> .....	735
<i>The Garnishment Bond</i> .....	736
<i>Service Of The Writ</i> .....	737
<i>The Garnishee's Answer</i> .....	738
<i>Debtor's Right To Replevy</i> .....	742
<i>Trial, Judgment And Enforcement</i> .....	743
<i>Conclusion</i> .....	745
PROPERTY SUBJECT TO EXECUTION ..... <i>Arthur J. Milberger</i>	746
<i>Sale of Homestead</i> .....	747
<i>Trusts</i> .....	748
<i>Property And Interest Of A Deceased, Heir, And Devisee</i> .....	749
<i>Property In Custodia Legis</i> .....	750
<i>Equitable Interests In Realty And Leaseholds</i> .....	751
<i>Undivided Interests</i> .....	752
<i>Agricultural Products</i> .....	753
<i>Surety-Principal Property</i> .....	753
<i>Corporate Stock And Partnership Property</i> .....	754
<i>Fraudulent Transfers</i> .....	755
<i>Mortgaged Property</i> .....	756
<i>The Uniform Commercial Code And Execution</i> .....	757
PROCEDURE IN EXECUTION ..... <i>Lawrence M. Ludka</i>	759
POST-JUDGMENT DISCOVERY ..... <i>William G. Delano, Jr.</i>	768
<i>Post-Judgment Discovery Prior To 621a</i> .....	769
<i>Post-Judgment Discovery Under Rule 621a</i> .....	770
CONCLUSION .....	772

## INTRODUCTION

L. HAMILTON LOWE\*

One of the most frustrating experiences in the life of a Texas trial lawyer occurs when he has to inform his client that although he has won his case he will receive nothing but experience and a scrap of paper called a judgment. After both client and lawyer have spent considerable time and money preparing and trying a hotly contested lawsuit, after a jury has returned a verdict in their favor, and after a judge has rendered judgment on such verdict and decreed that the defendant must pay the plaintiff a considerable sum of money, the lawyer is forced to tell his client that the debt will not be satisfied because the defendant has succeeded in concealing all of his assets and now owns only exempt property. The lawyer can avoid this predicament, however, by investigating thoroughly the solvency of the defendant in the early stages of litigation. If this is done, the lawyer will be in a position to either take the steps necessary to impound the non-exempt assets of the defendant so as to prevent their alienation or disposal pending the outcome of the suit or tell his client in advance what to expect even if he wins his case. In any event, the client will not be nearly as dissatisfied as he will be if he gets a verdict and judgment, but no money.

Post-judgment creditors' remedies, such as sequestration, garnishment and receivership, were originally covered by creditors' bills in Texas. Through subsequent statutory provisions, however, these specific remedies were removed from the ambit of the creditors' bill.<sup>1</sup> The usefulness of the bill is today limited severely because, by statutory definition, the creditors' bill is designed to benefit a creditor who has exhausted all his remedies at law.<sup>2</sup> To invoke this equitable action a creditor must obtain a proper judgment and establish his priority over other creditors.<sup>3</sup> In addition, the bill will operate on property such as intangibles, choses in action or contingent interests which by reason of their nature only, and not by reason of any rule exempting them from liability for debts, cannot be subject to execution.<sup>4</sup>

The effect of creditors' bills has been further delimited by a succession of early decisions<sup>5</sup> culminating in the application of these bills to areas of

---

\* Attorney at law, Austin, Texas; LL.B., University of Texas.

1. Griffs, *Creditors' Bills*, in CREDITORS' RIGHTS IN TEXAS 151-52 (J. McKnight ed. 1963).

2. *Id.* at 151.

3. Comment, *Creditors' Bills in Texas*, 5 TEXAS L. REV. 263, 265 (1927).

4. *Id.* at 265.

5. *See, e.g.,* Cargill v. Kountze Bros., 86 Tex. 386, 22 S.W. 1015 (1893); White

fraud and trusts.<sup>6</sup> These cases were reviewed in *Gulf National Bank v. Bass*<sup>7</sup> where the plaintiff sought the appointment of a receiver to collect and hold his claim and an injunction to prevent the defendant from making an assignment of the claim. The court denied the plaintiff equitable relief, stating that although the point had not been directly decided, it had become settled that creditors' suits could be brought only in cases dealing with fraud or trusts.<sup>8</sup>

Although the validity of the limitations in *Bass* remains unchallenged,<sup>9</sup> there is some indication that the outlook of the courts toward creditors' bills may be changing. In *Chander v. Welborn*,<sup>10</sup> a suit to try title to realty conveyed by decedent to the plaintiffs, the Supreme Court of Texas allowed the creditors to intervene to set aside the deed. The court stated that "[e]quity will not suffer a right to be without a remedy."<sup>11</sup> It was recommended that an equitable action such as a creditor's bill should be used to reach funds which justly belong to the estate so that they may be distributed to the creditor.<sup>12</sup> Although this decision reflects a loosening of the rigid application of the bill, its true effect remains to be seen. The limited use of creditors' bills and their inapplicability in situations giving rise to the statutory remedies discussed in this symposium account for the lack of further references to this post-judgment remedy.

The decision as to whether or not a post-judgment remedy is available without undue risk may be aided by the discovery rules. However, in cases where these steps have not been taken prior to judgment, execution and garnishment may have to be employed. It is with these post-judgment remedies of garnishment and execution that this symposium is primarily concerned and because the implementation of either proceeding is fraught with opportunity for error, emphasis has been placed on the proper procedures to be followed and the possible pitfalls that may be encountered in their use.

The writ of garnishment may be used immediately after judgment if the proper requirements are present. Execution, on the other hand, may not

---

*Sewing Mach. Co. v. Atkeson*, 75 Tex. 330, 12 S.W. 812 (1889); *Galveston H. & S.A. Ry. v. Hume*, 59 Tex. 47 (1883); *Galveston H. & S.A. Ry. v. Butler*, 56 Tex. 506 (1882); *Taylor v. Gillean*, 23 Tex. 508 (1859).

6. Griffs, *Creditors' Bills*, in CREDITORS' RIGHTS IN TEXAS 152 (J. McKnight ed. 1963). The series of statutes governing fraudulent conveyances has greatly defeated the use of the non-statutory creditors' bill in situations of fraud. *Id.*

7. 177 S.W. 1019 (Tex. Civ. App.—San Antonio 1915, writ ref'd).

8. *Id.* at 1023.

9. Griffs, *Creditors' Bills*, in CREDITORS' RIGHTS IN TEXAS 154-55 (J. McKnight ed. 1963).

10. 156 Tex. 312, 294 S.W.2d 801 (1956).

11. *Id.* at 319, 294 S.W.2d at 807.

12. *Id.* at 319, 294 S.W.2d at 807, quoting J. POMEROY, EQUITY JURISPRUDENCE 459 (5th ed. 1941).

be employed until 20 days have elapsed after rendition of the judgment. If the grounds for garnishment do not exist, then the creditor should wait the 20 days to secure a writ of execution; otherwise, a wrongful garnishment will occur. The risk of wrongful garnishment, however, may be minimized by using the discovery procedure available after judgment.

In addition to these procedural considerations, the symposium also sets out the types of property which are exempt from both the writ of garnishment and levy of execution. In Texas, the exempt status given to homesteads and the proceeds of their sale, current wages, property in legal custody, property held in trust, certain undivided interests, partnership funds and assets, pledged or secured funds or property and others is appropriately broad. The livelihood of the debtor and his family should not be unduly jeopardized by creditors seeking to collect debts which have been induced by over-salesmanship on the part of the creditor. It is for this reason, however, that the attorney should be diligent in determining whether or not certain types of property actually in the possession of the defendant are legally subject to seizure or impoundment.

Finally, the symposium presents the fundamental rules for invoking the jurisdiction of the courts and for governing the proper application of the venue statutes in the context of those particular devices which come into play both offensively and defensively in the development of either post-judgment proceeding. Because the article discusses most of the questions raised in these areas in depth, further elaboration at this point is unnecessary. It is sufficient to say that a practicing lawyer will derive great benefit from reading this student work.

## THE GARNISHMENT PROCESS

An action in garnishment allows a debtor to satisfy his creditors with goods, money, or credits which are owned directly to the debtor by a third party.<sup>1</sup> The proceeding involves three major parties—the principal plaintiff or garnishor, the principal defendant or debtor, and the garnishee, the individual in the possession of the debtor's property, money, or credits. Garnishment has been characterized as a proceeding in rem because "the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it"<sup>2</sup> and as a form of attachment because it seizes the effects of the defendant in the possession of the garnishee.<sup>3</sup> The garnishment action has also been described as ancillary in that it cannot be separated from the original lawsuit between the principal plaintiff and defendant<sup>4</sup> and as "inquisitorial" in that its purpose is to ascertain the facts<sup>5</sup> and determine whether the garnishee, against whom the writ is issued, is indebted to or has property belonging to the principal defendant in his possession.<sup>6</sup>

Article 4076 of the Texas Revised Civil Statutes provides for the issuance of the writ of garnishment on an original attachment, a due and unpaid debt, or in satisfaction of an existing judgment.<sup>7</sup> Although the basis for

---

1. *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937).

2. *Buchanan v. A.B. Spencer Lumber Co.*, 134 S.W. 292, 293 (Tex. Civ. App. 1911, no writ); *accord*, *Foy v. East Dallas Bank*, 28 S.W. 137, 139 (Tex. Civ. App. 1894, no writ), *citing* *Berry v. Davis*, 77 Tex. 191, 13 S.W. 978 (1890).

Garnishment has also been characterized as having dual qualities, in personam and in rem. *Citizens Nat'l Bank v. Hart*, 321 S.W.2d 319, 320-21 (Tex. Civ. App.—Fort Worth 1959, writ ref'd).

3. *Snyder Motor Co. v. Universal Credit Co.*, 199 S.W.2d 792, 794 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.).

4. *King & King v. Porter*, 113 Tex. 198, 200, 252 S.W. 1022 (1923); *Texas Co. v. Disney*, 279 S.W. 280, 281 (Tex. Civ. App.—Eastland 1925, writ ref'd); Note, 1 *St. MARY'S L.J.* 240, 241 (1969).

5. *Jemison v. Scarborough*, 56 Tex. 358, 361 (1882); *McKesson & Robbins, Inc. v. Southwestern Drug Corp.*, 165 S.W.2d 758, 761 (Tex. Civ. App.—Dallas 1942), *rev'd on other grounds*, 141 Tex. 284, 172 S.W.2d 485 (1943).

6. *Jemison v. Scarborough*, 56 Tex. 358, 361 (1882); *Smith v. Rogers*, 147 S.W.2d 934, 935 (Tex. Civ. App.—San Antonio 1941, no writ).

7. The statute in its entirety reads:

The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts, in the following cases:

1. Where an original attachment has been issued.

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the defendant has not within his knowledge property in his possession within this State, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.

3. Where the plaintiff has a valid, subsisting judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution sufficient to satisfy such judgment.

the issuance of the writ may vary, the relationship of the parties involved remains substantially unchanged. Since the garnishee has not violated any of the provisions of his debt to the principal defendant and is not directly indebted to the garnishing creditor, his liability to the garnishor is contingent upon the right of the principal defendant to maintain suit against him.<sup>8</sup> Upon final judgment, the garnishor applies the proceeds of the suit to the satisfaction of the debt or judgment owed to him by the debtor.<sup>9</sup> The amount of the judgment awarded the garnishor, however, cannot exceed the debt owed by the garnishee to the principal defendant or the property held by the garnishee.<sup>10</sup> The garnishing party therefore acquires no greater right against the garnishee for he "merely steps into the shoes of his debtor"<sup>11</sup> and has no authority to place the garnishee in a less favorable position than he necessarily would occupy in a suit brought by the principal defendant.<sup>12</sup> The rights of third parties, such as those claiming the property to be garnished, are not determined under the statute, nevertheless, it is well established that such parties may "intervene or be interpleaded by the garnishee for the purpose of having their rights determined."<sup>13</sup>

While case law generally establishes the relationship between the parties,<sup>14</sup> the rules and statutes narrowly define the procedures which must be followed to maintain a valid garnishment suit.<sup>15</sup> The process is exclusively

---

TEX. REV. CIV. STAT. ANN. art. 4076 (1966). The purpose of this paper is to explore post-judgment remedies and will only deal with a writ of garnishment issued when the plaintiff has a valid judgment.

8. *Jemison v. Scarborough*, 56 Tex. 358, 361 (1882); *Pearson Grain Co. v. Plains Trucking Co.*, 494 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *Becker v. Cooper*, 22 S.W.2d 1083, 1085 (Tex. Civ. App.—Waco 1929, writ dism'd).

9. *Becker v. Cooper*, 22 S.W.2d 1083, 1085 (Tex. Civ. App.—Waco 1929, writ dism'd).

10. *Mensing v. Engelke*, 67 Tex. 532, 537, 4 S.W. 202, 204 (1887); *Pace v. Pierson*, 145 S.W.2d 929, 931-32 (Tex. Civ. App.—Eastland 1940, no writ); *White v. Sibley*, 59 S.W.2d 266, 267 (Tex. Civ. App.—El Paso 1933, writ dism'd).

11. *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937).

12. *Iglehart v. Moore*, 21 Tex. 501, 502 (1858); *Pearson Grain Co. v. Plains Trucking Co.*, 494 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

13. *Staley, Langford & Chenault v. City Nat'l Bank*, 253 S.W. 626, 628-29 (Tex. Civ. App.—Amarillo 1923, no writ); *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.*, 195 S.W. 201, 205 (Tex. Civ. App.—El Paso 1917, writ ref'd); *Reinertsen v. E.W. Bennet & Sons*, 185 S.W. 1027, 1029 (Tex. Civ. App.—El Paso 1916, writ ref'd). See generally Note, 37 TEXAS L. REV. 790 (1959).

14. See, e.g., *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937); *Jemison v. Scarborough*, 56 Tex. 358, 361 (1882); *Iglehart v. Moore*, 21 Tex. 501, 502 (1858); *Becker v. Cooper*, 22 S.W.2d 1083, 1085 (Tex. Civ. App.—Waco 1929, writ dism'd).

15. TEX. R. CIV. P. 657-679; TEX. REV. CIV. STAT. ANN. arts. 4076, 4084, 4093, 4096, and 4099 (1966).

For cases stating that the above must be strictly followed see *Jemison v. Scarborough*, 56 Tex. 358, 361 (1882); *Krieger v. Sheffield, Garrett & Carter*, 341 S.W.2d 564, 566 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.); *Hanson v. Guardian Trust Co.*, 150

confined to these statutory constructions and the principles of equity have no application in determining the outcome of the suit.<sup>16</sup> Service of the writ of garnishment attaches all goods of the defendant which are in garnishee's possession at the time of service,<sup>17</sup> or "so owing at the time the garnishee is required by the writ to appear and answer."<sup>18</sup> The garnishee will be personally liable to the garnishing party if he attempts to return to the defendant or takes any other action which will jeopardize the position of the garnishor after being served with the writ.<sup>19</sup> The writ notifies the garnishee that he is liable for and must answer as to all assets and goods of the debtor which are in his possession.<sup>20</sup> In responding to the writ, the garnishee may assert any defense which is available to the principal defendant if the property were in his possession.<sup>21</sup> The garnishee is also required to plead any exemption applicable to the goods in question<sup>22</sup> and the garnishee may have the principal defendant cited in the proceeding so that the defendant may establish the exemption.<sup>23</sup> When the answer is filed, the garnishor may controvert any allegations he believes in good faith to be incorrect.<sup>24</sup> If the garnishee fails to answer the writ or makes an incomplete answer, judg-

---

S.W.2d 465, 467 (Tex. Civ. App.—Galveston 1941, writ *dism'd*); *Buchanan v. A.B. Spencer Lumber Co.*, 134 S.W.2d 292, 293 (Tex. Civ. App.—1911, no writ).

16. *Hanson v. Guardian Trust Co.*, 150 S.W.2d 465, 467 (Tex. Civ. App.—Galveston 1941, writ *dism'd*); *Smith v. Rogers*, 147 S.W. 2d 934, 935 (Tex. Civ. App.—San Antonio 1941, no writ).

17. TEX. R. CIV. P. 669.

18. *Jarecki Mfg. Co. v. Consolidated Gasoline Co.*, 129 Tex. 644, 648, 105 S.W.2d 663 (1937). The garnishee may answer before or after (if no default judgment has been entered) the date specified in the writ but he cannot add to the indebtedness owing the plaintiff by delaying his answer or subtract therefrom by answering early. *Id.* at 650, 105 S.W.2d at 663.

19. *Pure Oil Co. v. Walsh-Woldert Co.*, 36 S.W.2d 802, 805 (Tex. Civ. App.—Texarkana 1931, writ *dism'd*); *accord*, *Baughn v. J.B. McKee Co.*, 124 S.W. 732, 732-33 (Tex. Civ. App. 1909, no writ). In *Baughn* the court held that the garnishee could not recover the amount of an indebtedness voluntarily paid to the principal defendant after service of the writ because he had no legal obligation to do so and the law specifically prohibited him from making such payment. *Baughn v. J.B. McKee Co.*, 124 S.W. 732, 732-33 (Tex. Civ. App. 1909, no writ), *citing* *Taylor v. Hall*, 71 Tex. 213, 9 S.W. 141 (1888).

20. *Hanson v. Guardian Trust Co.*, 150 S.W.2d 465, 467 (Tex. Civ. App.—Galveston 1941, writ *dism'd*).

21. *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937); *Ellison v. Tuttle*, 26 Tex. 283, 285 (1862).

22. *Smith v. Security Inv. Co.*, 16 S.W.2d 926, 928 (Tex. Civ. App.—Eastland 1929, no writ), *citing* *Missouri Pac. Ry. v. Whipker*, 77 Tex. 14, 13 S.W. 369 (1890). *See* *Baumgardner v. Southern Pac Co.*, 177 S.W.2d 317, 320 (Tex. Civ. App.—El Paso 1943, no writ); *J.M. Radford Co. v. McKean*, 41 S.W.2d 639, 640 (Tex. Civ. App.—Fort Worth 1931, no writ).

23. *Missouri Pac. Ry. v. Whipker*, 77 Tex. 14, 18, 13 S.W. 639, 640 (1890); *Russell v. Hamilton*, 174 S.W. 705, 706 (Tex. Civ. App.—Texarkana 1915, no writ). *See generally* Note, 37 TEXAS L. REV. 790, 793 (1959).

24. *Ellison v. Tuttle*, 26 Tex. 283, 286 (1862); *First Nat'l Bank v. Wilson*, 22 S.W.2d 546, 547 (Tex. Civ. App.—Eastland 1929, no writ); TEX. R. CIV. P. 673.



ment may be entered against him.<sup>25</sup>

#### PROPERTY SUBJECT TO GARNISHMENT

Property to be garnished under the writ of garnishment must be personalty and subject to seizure and sale by execution, for the writ will not operate on real property.<sup>26</sup> Although personalty involves a wide spectrum, the following represent types of personal property which have most often been the subject of the writ.

##### *Debts*

A debt must be absolute and payable and independent of any contingency to be the proper subject of a garnishment action.<sup>27</sup> Although a contingent contract may not be garnished, the Texas Supreme Court held in *Phenix Insurance Co. v. P. J. Willis & Bro.*<sup>28</sup> that the process may be levied on a debt which is absolutely and unconditionally due but the payment of which awaits the happening of a future event certain to occur.<sup>29</sup>

For a fund or liability to be garnished it must be liquidated, with both the duty to pay and the amount due determined, at the time of the filing of the garnishee's answer.<sup>30</sup> The rationale of this principle was stated in *Hall v. Nunn Electric Co.*,<sup>31</sup> wherein the court stressed that the amount due must be determined so that the garnishee may fulfill his requirement to state under oath precisely what he owes to the principal defendant.<sup>32</sup>

##### *Banking Transactions*

Courts have held that funds in a bank deposit or account may be impounded under the writ irrespective of the name on the account.<sup>33</sup> In

25. *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 190, 47 S.W. 95, 97 (1898); TEX. R. CIV. P. 667.

26. *Price v. Brady*, 21 Tex. 614, 617 (1858); *Fitzgerald v. Brown, Smith & Marsh Bros.*, 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dism'd); TEX. R. CIV. P. 672; Lowe, *Collection of Debts By Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in CREDITORS' RIGHTS IN TEXAS 234 (J. McKnight ed. 1963).

27. *Clapper v. Petrucci*, 497 S.W.2d 120, 122 (Tex. Civ. App.—Austin 1973, no writ); *Saenger v. Proske*, 232 S.W.2d 106, 108 (Tex. Civ. App.—Austin 1950, no writ).

28. 70 Tex. 12, 6 S.W. 825 (1888).

29. *Id.* at 15-16, 6 S.W. at 829. In this case proceeds of an insurance policy due for fire loss were held to be subject to garnishment after proper proof of the loss had been filed. *Id.* at 15-16, 6 S.W. at 829.

30. *Alexander v. Berkman*, 3 S.W.2d 864, 867 (Tex. Civ. App.—Waco 1927, writ ref'd).

31. 183 S.W. 13 (Tex. Civ. App.—Amarillo 1916, writ ref'd).

32. *Id.* at 18.

33. *Frankfurt's Texas Inv. Corp. v. Trinity Sav. & Loan Ass'n*, 414 S.W.2d 190, 195 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); *Stevens v. Simmons*, 61 S.W.2d 122, 125 (Tex. Civ. App.—El Paso 1933, no writ).

*Tatum State Bank v. Gibson*,<sup>34</sup> the name on the account was disregarded in impounding community funds, but the court emphasized that there must be sufficient proof alleged to show the funds on deposit were not the separate property of one spouse.<sup>35</sup>

Banks have often been garnished by judgment creditors to procure the contents of safety deposit boxes. The court allowed garnishment in *Blanks v. Radford*<sup>36</sup> holding that it was immaterial that the bank had no knowledge of the contents of the safety deposit box.<sup>37</sup>

### *Negotiable Instruments*

Although a bank deposit may be garnished at any time, a negotiable instrument<sup>38</sup> may not be garnished until it reaches maturity.<sup>39</sup> This rule protects the maker of the note, who is indebted to the holder of the note at maturity, from making double payment.<sup>40</sup> In an early Texas case, *Thompson v. Gainesville National Bank*,<sup>41</sup> the supreme court announced that this exemption from garnishment action should be applicable only as long as the reason for the rule exists.<sup>42</sup> Therefore, notes which are past due<sup>43</sup> or non-negotiable<sup>44</sup> are *always* a proper subject for garnishment.

### *Shares of Stock*

Rules 669 and 678 of the Texas Rules of Civil Procedure have speci-

34. 24 S.W.2d 506 (Tex. Civ. App.—Texarkana 1930, no writ).

35. *Id.* at 507; *accord*, *Ryals v. Garza*, 264 S.W.2d 548, 550-51 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); *Taylor v. Suloch Oil Co.*, 141 S.W.2d 657, 660 (Tex. Civ. App.—Amarillo 1940, writ dism'd jdgmt cor.).

36. 188 S.W.2d 879 (Tex. Civ. App.—Eastland 1945, writ ref'd w.o.m.).

37. *Id.* at 886, *quoting* *Trowbridge v. Spinning*, 62 P. 125 (Wash. 1900).

38. *See* TEX. REV. CIV. STAT. ANN. art. 5932, § 1 (1962). This statute characterizes a negotiable note as a written and signed unconditional promise to pay a specified sum on demand or at a fixed time in the future.

39. *Iglehart v. Moore*, 21 Tex. 501, 502 (1858).

40. *Id.* at 502-503.

41. 66 Tex. 156, 18 S.W. 350 (1886).

42. *Id.* at 158, 18 S.W. at 350-51.

43. *Thompson v. Gainesville Nat'l Bank*, 66 Tex. 156, 157, 18 S.W. 350 (1886); *Davis v. First Nat'l Bank*, 135 S.W.2d 259, 261 (Tex. Civ. App.—Waco 1939, no writ). *See generally* *Lowe, Collection of Debts By Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in *CREDITOR'S RIGHTS IN TEXAS* 237 (J. McKnight ed. 1963).

Past due notes may be garnished because they "cannot be assigned to an innocent party, free from those defenses which the maker could successfully set up in a suit against him by the assignee." *Thompson v. Gainesville Nat. Bank*, 66 Tex. 156, 157, 18 S.W. 350 (1886).

44. *Saenger v. Proske*, 232 S.W.2d 106, 108 (Tex. Civ. App.—Austin 1950, no writ), *citing* *Neal v. Kurz*, 26 S.W.2d 478 (Tex. Civ. App.—El Paso 1930, no writ); *Alexander v. Berkman*, 3 S.W.2d 864, 867 (Tex. Civ. App.—Waco 1927, writ ref'd).

The reason for the rule fails here because these notes are not transferable by en-

fically included shares of stock as property of the defendant that is subject to garnishment. In discussing this provision, the court, in *Nixon v. Nixon*,<sup>45</sup> allowed the shares to be effectively impounded by an actual seizure of the stock certificates in the possession of the garnishee.<sup>46</sup> Seizure of the certificates is necessary to prevent other transfers of the same stock.<sup>47</sup>

### Trust Funds

A trust fund is generally not subject to garnishment.<sup>48</sup> It is well established, however, that a trust which does not contain express words of restraint, does not attempt to provide the beneficiary with support, and allows direct payments to the beneficiary with the right to use the income from the trust as he wishes, may be properly subjected to the payment of the beneficiary's debts.<sup>49</sup> If a spendthrift trust, in which the beneficiary is prohibited from assigning his interests,<sup>50</sup> is in effect when the garnishment action is issued, the funds may not be reached by a creditor of the beneficiary.<sup>51</sup> The spendthrift trust, however, is not totally immune from garnishment. The court in *Glass v. Carpenter*<sup>52</sup> held that where the settlor creates a trust which makes himself the beneficiary, public policy will prohibit the protection of his funds or income therefrom against the valid claims of his own creditors.<sup>53</sup>

Trust funds generally may not be garnished for the debts of an individual trustee,<sup>54</sup> however, a trustee may become personally liable for goods held in trust which have been disposed of or converted to his private use.<sup>55</sup>

---

dorsement and delivery and, therefore, the maker of the note could not be required to pay two persons.

45. 348 S.W.2d 434 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

46. *Id.* at 437. See generally Lowe, *Collection of Debts By Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in CREDITORS' RIGHTS IN TEXAS 236 (J. McKnight ed. 1963).

47. *Snyder Motor Co. v. Universal Credit Co.*, 199 S.W.2d 792, 797 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.).

48. *Oglesby v. Durr*, 173 S.W. 275, 278 (Tex. Civ. App.—Austin 1914, writ ref'd).

49. *Nunn v. Titcher-Goettinger Co.*, 245 S.W. 421, 422 (Tex. Comm'n App. 1922, jdgmt adopted).

50. *Hines v. Sands*, 312 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1958, no writ), citing *Long v. Long*, 252 S.W.2d 235, 246 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.).

51. *Id.* *Lindsey v. Rose*, 175 S.W. 829, 831 (Tex. Civ. App.—Austin 1915, writ ref'd).

52. 330 S.W.2d 530 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

53. *Id.* at 533. This rule is applicable irrespective of the fraudulent intent of the settlor or trustee. *Id.* at 533.

54. *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937); *Belva Oil Co. v. Lowe*, 27 S.W.2d 599, 600 (Tex. Civ. App.—Eastland 1930, no writ); *King & King v. Porter*, 229 S.W. 646, 647 (Tex. Civ. App.—Austin 1921, no writ); *Brown v. Cassidy-S.W. Comm'n Co.*, 225 S.W. 833, 835 (Tex. Civ. App.—Fort Worth 1920, no writ).

55. *White v. Sibley*, 59 S.W.2d 266, 268 (Tex. Civ. App.—El Paso 1933, writ dism'd).

*Partnership Funds*

As a general rule, partnership funds are liable for the debts of the partnership.<sup>56</sup> However, the principal plaintiff is prohibited from using the writ of garnishment to garnish a partnership in order to collect a debt owed to him by the principal defendant in his capacity as a partner.<sup>57</sup> The rationale behind this exemption rests on the fact that the amount of the partner's interest can not be ascertained until final determination of all the partnership accounts<sup>58</sup> and the statutory processes involved in garnishment are not adapted to such equitable issues.<sup>59</sup> When the reason for the rule fails, however, the exemption becomes inapplicable. For example, in *Beggs v. Brooker*<sup>60</sup> all the partners of a partnership were personally, jointly and severely liable on a note to the principal plaintiff. The court allowed garnishment of attorney's fees owing to the defendant stating that the individual liability of all the partners made them liable just as if it were a partnership debt.<sup>61</sup>

*Assignments*

Property belonging to or an indebtedness owed to the principal defendant which has been validity assigned by the garnishee prior to the service of the writ may not be garnished, for the writ impounds only those funds actually in the possession of the garnishee or an indebtedness owed by him at the time of service.<sup>62</sup> This rule was held inapplicable in *Hobbs v. Downing*<sup>63</sup> where funds had been transferred for the purpose of defrauding creditors.<sup>64</sup> The Texas Business and Commerce Code makes an additional allowance for

56. See *Gottesman v. Toubin*, 353 S.W.2d 294, 299 (Tex. Civ. App.—Houston 1962, no writ); *Vassiliades v. Theophiles*, 115 S.W.2d 1220, 1222 (Tex. Civ. App.—Eastland 1938, writ dism'd); *Beggs v. Brooker*, 79 S.W.2d 642, 643 (Tex. Civ. App.—Fort Worth 1934), *aff'd sub nom.* *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937).

57. *Gottesman v. Toubin*, 353 S.W.2d 294, 299 (Tex. Civ. App.—Houston 1962, no writ); *accord*, *Vassiliades v. Theophiles*, 115 S.W.2d 1220, 1222 (Tex. Civ. App.—Eastland 1938, writ dism'd); *Beggs v. Brooker*, 79 S.W.2d 642, 643 (Tex. Civ. App.—Fort Worth 1934), *aff'd sub nom.* *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Belva Oil Co. v. Lowe*, 27 S.W.2d 599, 600 (Tex. Civ. App.—Eastland 1930, no writ).

58. *Beggs v. Brooker*, 79 S.W.2d 642, 643 (Tex. Civ. App.—Fort Worth 1934), *aff'd sub nom.* *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Brown v. Cassidy-S.W. Comm'n Co.*, 225 S.W. 833, 835 (Tex. Civ. App.—Fort Worth 1920, no writ).

59. *Beggs v. Brooker*, 79 S.W.2d 642, 643 (Tex. Civ. App.—Fort Worth 1934), *aff'd sub nom.* *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937).

60. 79 S.W.2d 642, 643 (Tex. Civ. App.—Fort Worth 1934), *aff'd sub nom.* *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937).

61. *Id.* at 644.

62. *Saenger v. Proske*, 232 S.W.2d 106, 109 (Tex. Civ. App.—Austin 1950, no writ); *Amarillo Nat'l Bank v. Panhandle Tel. & Tel. Co.*, 169 S.W. 1091, 1092-93 (Tex. Civ. App.—Amarillo 1914, no writ).

63. 147 S.W.2d 284 (Tex. Civ. App.—Amarillo 1941, no writ).

64. *Id.* at 285-86, *quoting* *Willis v. Yates*, 12 S.W. 232 (Tex. Sup. 1889).

the garnishment of some funds when both consenting and non-consenting creditors are involved.<sup>65</sup>

### *Pledged Property*

Property of the principal defendant or debtor which has been promised or pledged to a third party by the garnishee may be sold on execution against the maker of the pledge.<sup>66</sup> In *Waggoner v. Briggs*<sup>67</sup> money which was pledged to sureties on a bail bond to secure them against liability was held to be subject to garnishment contingent upon two factors: the garnishment action must not prejudice the rights of the pledgee and the conditions of the pledge must be fully performed.<sup>68</sup> In *Waggoner* the acquittal of the defendant ended the agreement as to the pledged fund and the pledgee-sureties had no further interest in it as a security for the performance of the bail bond.

### *Bailments*

It is well established that property in the hands of a bailee may be subjected to seizure by garnishment for the debts of the bailor-debtor irrespective of the right of the bailor to reclaim his goods on demand.<sup>69</sup> The ability of the creditor to reach such goods was delimited in *Hearn v. Foster*.<sup>70</sup> In that case bailed money, to be delivered to a third party on the happening of a certain event, was held not subject to garnishment after the specific occurrence had vested title in the third party.<sup>71</sup>

### *Insurance Policies*

Since a writ of garnishment may not be issued on a debt which is contingent and uncertain,<sup>72</sup> recovery of the proceeds of an insurance policy may not be garnished until the principal defendant's rights have accrued.<sup>73</sup> Al-

65. TEX. BUS. & COMM. CODE ANN. § 23.33 (1968) provides:

If a creditor does not consent to an assignment, he may garnishee the assignee for the excess of the assigned estate remaining in the assignee's possession after the assignee has paid

(1) each consenting creditor the amount of his claim allowed under Section 23.31(b) of this code; and

(2) the expense of carrying out the assignment.

66. TEX. R. CIV. P. 643.

67. 166 S.W. 50 (Tex. Civ. App.—Texarkana 1914, no writ).

68. *Id.* at 52.

69. *Hearn v. Foster*, 21 Tex. 369, 370 (1858); *McClung v. Watson*, 165 S.W. 532, 535 (Tex. Civ. App.—Amarillo 1914, no writ).

70. 21 Tex. 369 (1858).

71. *Id.* at 370.

72. *Household Fin. Corp. v. Reyes*, 408 S.W.2d 739, 740 (Tex. Civ. App.—Texarkana 1966, writ *dism'd*); *First Nat'l Bank v. Friend*, 23 S.W.2d 482, 483 (Tex. Civ. App.—Fort Worth 1929, no writ).

73. *Phenix Ins. Co. v. P.J. Willis & Bro.*, 70 Tex. 12, 15-16, 6 S.W. 825, 829

though the performance of the contingent event firmly establishes the liability of the insurance company,<sup>74</sup> the proceeds still may not be garnished if the policy was issued on exempt property.<sup>75</sup> This rule is illustrated by *Chase v. Swayne*<sup>76</sup> wherein money paid on a policy covering a homestead was held not to be subject to garnishment irrespective of the absolute liability of the company.<sup>77</sup> The cash surrender value of a life insurance policy may also be free from garnishment if the policy has been in effect for more than 2 years and the members of the defendant's family are named as beneficiaries.<sup>78</sup> This statutory exemption applies only to that portion of the policy which names the family as beneficiaries.<sup>79</sup>

### Judgments

An outstanding judgment from a prior litigation which is owed by the garnishee to the principal defendant may be garnished if the garnishee has exhausted all of his remedies.<sup>80</sup> In *Dodson v. Warren Hardward Co.*,<sup>81</sup> it was determined that a judgment must be final in the sense that it can be neither set aside nor reversed on appeal.<sup>82</sup> If the garnishment action is brought in the same court in which the judgment is rendered, the court automatically takes notice of the judgment and it, therefore, need not be entered into evidence.<sup>83</sup>

### PROPERTY EXEMPTED FROM GARNISHMENT

Although certain types of personal property have been the subject of a garnishment action, the Texas Legislature has exempted other specific forms of personalty when seizure of the goods or money might work an undue hardship on the defendant-debtor. These specific exemptions may be di-

---

(1888); *Bauer v. Deike*, 122 S.W.2d 1100, 1101 (Tex. Civ. App.—El Paso 1938, no writ); *First Nat'l Bank v. Friend*, 23 S.W.2d 482, 483 (Tex. Civ. App.—Fort Worth 1929, no writ).

74. *Phenix Ins. Co. v. P.J. Willis & Bro.*, 70 Tex. 12, 16 S.W. 825, 829 (1888).

75. *Chase v. Swayne*, 88 Tex. 218, 223, 30 S.W. 1049, 1051 (1895); *Ward v. Gogan*, 23 S.W. 479, 480 (Tex. Civ. App. 1893, no writ).

76. 88 Tex. 218, 30 S.W. 1049 (1895).

77. *Id.* at 222, 30 S.W. at 1050.

78. TEX. REV. CIV. STAT. ANN. art. 3836(a)(6) (Supp. 1974), formerly art. 3832a (1966).

79. *Id.*

80. *Alexander v. Berkman*, 3 S.W.2d 864, 867 (Tex. Civ. App.—Waco 1927, writ ref'd).

81. 162 S.W. 952 (Tex. Civ. App.—Amarillo 1914), writ *dism'd*, 110 Tex. 576, 222 S.W. 157 (1920).

82. *Id.* at 954, quoting *Waples-Plater Grocer Co. v. Texas & Pac. Ry. Co.*, 95 Tex. 486, 68 S.W. 265 (1902).

83. Although the presumption was inappropriate in the instant case, the court recognized it as a rule. *Orleans Mfg. Co. v. Hinkley*, 61 S.W.2d 865, 866 (Tex. Civ. App.—San Antonio 1933, writ *dism'd*).

vided into five general categories: current wages, funds relating to realty, public policy considerations, disability payments, and property under legal custody.

### *Current Wages*

The Texas Constitution and the Texas Civil Statutes prohibits the garnishment of current wages.<sup>84</sup> Without proper protection a worker may be deprived of the necessary means to support himself and his family, he may be forced to leave his job by an employer who dislikes any involvement in garnishment proceedings, or he may voluntarily seek a bankruptcy action as the sole means of satisfying his debts.<sup>85</sup> Although the various states agree that the exemption of wages is generally supported by these three arguments,<sup>86</sup> the significant diversity of exemptions throughout the nation illustrates the difficulty at arriving at a fair solution for creditor and debtor and may result in future statutory changes.

In Texas, this exemption specifically includes wages or salaries paid periodically by an employer for personal services;<sup>87</sup> however, it will not control as soon as the wages are due or have been paid to the employee.<sup>88</sup> The Texas Supreme Court applied this rule in *Bell v Indian Live-Stock Co.*,<sup>89</sup> holding that wages left in the possession of the employer which had already become due were not exempted and could be garnished.<sup>90</sup>

### *Real Property*

Although real property is not the proper subject of a garnishment action,<sup>91</sup> there are exemptions for funds which come from a sale of real prop-

---

84. TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (1968). Only Florida and Maine join Texas in exempting all wages. Other criteria for wage exemptions are: (1) The amount needed to support the debtor's family; and (2) a fixed amount or certain percentage of the wages. Most states exempt the greater sum—the percentage or the fixed amount. For a complete listing of the state statutes governing wage garnishment see Belsheim, *Wage Garnishment in Nebraska*, 51 NEB. L. REV. 63, 68 n.28-32 (1971). Federal policy on garnishment of wages is outlined in the Consumer Credit Protection Act. 15 U.S.C. §§ 1671-77 (1970).

85. Belsheim, *Wage Garnishment in Nebraska*, 51 NEB. L. REV. 63, 69-73 (1971).

86. *Id.* at 69.

87. *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 346 (Tex. Sup. 1889); *J.M. Radford Grocery Co. v. McKean*, 41 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1931, no writ); *Dempsey v. McKennell*, 23 S.W. 525 (Tex. Civ. App. 1893, no writ).

88. *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 346 (Tex. Sup. 1889); *Sutherland v. Young*, 292 S.W. 581, 582 (Tex. Civ. App.—Waco 1927, no writ); Note, 2 BAYLOR L. REV. 390, 391 (1950). *But see Lee v. Emerson-Brantingham Implement Co.*, 222 S.W. 283, 284 (Tex. Civ. App.—Dallas 1920, no writ) in which the court stated that if a wage-earner is unable to collect his wages when they are due, "the exemption then continues to such time when he can collect same in the exercise of ordinary diligence."

89. 11 S.W. 344 (Tex. Sup. 1889).

90. *Id.* at 346.

91. Cases cited note 26 *supra*.

erty or buildings or improvements made on the land. The homestead of a family has been protected by prohibiting an *involuntary* sale of the homestead for payment of debts.<sup>92</sup> Although garnishment would be ineffective against a homestead because of its limitation to personalty, the proceeds of a *voluntary* sale by a *consenting owner* have been exempted from garnishment within 6 months of the sale.<sup>93</sup> The court qualified this exemption in *Womack v. Stokes*<sup>94</sup> by holding that a note given on the purchase money of a homestead is a proper subject for garnishment.<sup>95</sup>

An ancillary exemption related to real property is found in article 5466 of the Texas Revised Civil Statutes which prohibits funds owing to a building contractor from being garnished by other creditors if the action would in any manner jeopardize the right to payment of the subcontractors and laborers involved in the construction. This statute protects the funds of subcontractors and laborers in an action by a principal plaintiff to garnish a contractor for debts owing to the defendant-debtor.

### *Public Policy*

It has been held that public policy dictates that compensation to public officials should not be garnished.<sup>96</sup> An early Texas case describes these public policy considerations by stating:

The public service is protected by protecting those engaged in performing public duties; and this not upon the ground of their private interests, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law had appointed for their payment.<sup>97</sup>

This exemption is treated in a similar manner as the exemption for current wages in that the court in *Smith v. Bradshaw*<sup>98</sup> limited its effect by holding that the exemption vanishes as the wages are paid or become due.<sup>99</sup>

Public policy also dictates that a city may never be held as a garnishee

92. TEX. CONST. art. XVI, § 50; TEX. REV. CIV. STAT. ANN. art. 3835 (Supp. 1974), formerly art. 3832(1) (1966).

93. *Graham Nat'l Bank v. First Nat'l Bank*, 48 S.W.2d 358, 359 (Tex. Civ. App.—Fort Worth 1932, writ ref'd); TEX. REV. CIV. STAT. ANN. art. 3834 (1966).

94. 35 S.W. 82 (Tex. Civ. App. 1896, no writ).

95. *Id.* at 86.

96. *Sanger v. Waco*, 40 S.W. 549, 550 (Tex. Civ. App. 1897, writ ref'd).

97. *State Nat. Bank v. Fink*, 86 Tex. 303, 305, 24 S.W. 256, 257 (1893), quoting *Bliss v. Lawrence*, 58 N.Y. 442, 444 (1874). The court went on to state that depriving an official of his daily support might lead to dishonest actions or actions detrimental to the public welfare. *State Nat. Bank v. Fink*, 86 Tex. 303, 306, 24 S.W. 256, 258 (1893).

98. 105 S.W.2d 340 (Tex. Civ. App.—Dallas), writ ref'd, 130 Tex. 180, 108 S.W.2d 200 (1937).

99. *Id.* at 341.



and its funds may never be garnished.<sup>100</sup> The Texas Supreme Court also applied this exemption to political subdivisions of the state performing governmental functions.<sup>101</sup> Retirement and annuity benefits of state employees<sup>102</sup> and pensions of firemen and policemen<sup>103</sup> are exempted as well as payments by the Municipal Retirement Board<sup>104</sup> and the Teacher's Retirement System.<sup>105</sup>

#### *Disability Benefits*

Disability benefits have been held to be free from garnishment because these payments are often the sole support of the disabled's family. For this reason, the Workmen's Compensation Law provides that all compensation received under its provisions is to be exempt from garnishment.<sup>106</sup> Similar exemptions are accorded to disability compensation awarded by the Highway Department<sup>107</sup> and welfare assistance to the aged, blind, or dependent children.<sup>108</sup>

#### *Property in the Custody of Law*

The general rule that property *in custodia legis* is not subject to garnishment, was established to protect the courts from conflicts and invasions by other tribunals.<sup>109</sup> In *Weeks v. Galveston Gas Co.*<sup>110</sup> it was determined that property in the custody of law encompasses all property in the hands of an executor or administrator, thereby providing for the administration of decedents' estates in an orderly manner.<sup>111</sup> Funds in the hands of a clerk of the court,<sup>112</sup> sheriff<sup>113</sup> and duly appointed receivers<sup>114</sup> are not subject to garnish-

---

100. TEX. REV. CIV. STAT. ANN. art. 1175, § 5 (1963).

101. *National Sur. Corp. v. Friendswood I.S.D.*, 433 S.W.2d 690, 694 (Tex. Sup. 1968).

102. TEX. REV. CIV. STAT. ANN. art. 6228a, § 9 (1970).

103. TEX. REV. CIV. STAT. ANN. arts. 6243, art. 6243a, § 16, art. 6243b, § 15, art. 6243d-1, § 17, art. 6243f, § 18, and art. 6243g, § 20 (1970).

104. TEX. REV. CIV. STAT. ANN. art. 6235a-1, § 6 (1970).

105. TEX. REV. CIV. STAT. ANN. art. 2922-1, § 16 and art. 2922-1f (1965).

106. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967). One reason advanced for the rule—to secure payments which are often the sole support of the family—was stated in Note, 4 TEXAS L. REV. 538 (1926).

107. TEX. REV. CIV. STAT. ANN. art. 6674s, § 6 (1969).

108. TEX. REV. CIV. STAT. ANN. art. 695c, § 29 (1964).

109. *Turner v. Gibson*, 105 Tex. 488, 489-90, 151 S.W. 793 (1912); *Southwestern Bell Tel. Co. v. Watson*, 413 S.W.2d 846, 848 (Tex. Civ. App.—Corpus Christi 1967, no writ).

110. 54 S.W. 620 (Tex. Civ. App. 1899, no writ).

111. *Id.* at 620; *accord*, *Pace v. Smith*, 57 Tex. 555, 558 (1882); *Huggins v. Phillips*, 275 S.W. 1084, 1086 (Tex. Civ. App.—Waco 1925, writ dismissed).

112. *Pace v. Smith*, 57 Tex. 555, 558 (1882); *Lummas Cotton Gin Sales Co. v. Connerly*, 30 S.W.2d 1112, 1114 (Tex. Civ. App.—Amarillo 1930, writ refused); *Reid v. Walsh*, 63 S.W. 940 (Tex. Civ. App. 1901, no writ).

113. *Pace v. Smith*, 57 Tex. 555, 561 (1882); *Challenge Co. v. Sartin*, 260 S.W. 313, 314 (Tex. Civ. App.—Dallas 1924, no writ).

ment if they are held in an official capacity. This rule was limited by the court in *Pace v. Smith*<sup>115</sup> which held the rule to be applicable only as long as the reason for its exists and when nothing remains to be done but delivery of the property, protection from conflicts and interference is unimportant and the property becomes a valid subject for garnishment.<sup>116</sup>

The writ of garnishment was designed to remedy some of the inequities and difficulties facing the judgment creditor in the satisfaction of his judgment. To insure, however, that the writ was not wrongfully or negligently employed, the legislature established certain statutory rules which are absolute prerequisites to perfection of the writ.<sup>117</sup>

### PROCEEDINGS IN GARNISHMENT

Before the commencement of a garnishment proceeding, the garnishor should insure that the garnishee has sufficient money or personal property of the principal defendant in his possession to make the suit worthwhile. This determination may be accomplished by a thorough investigation of the principal defendant himself as well as the individuals, partnerships, and corporations with whom he has dealt. Notwithstanding the fact that Texas "has one of the most liberal, if not the most liberal, exemption statutes of any state in the union,"<sup>118</sup> there remains non-exempt property upon which to obtain satisfaction. An attorney should remember, however, that under Rule 677 of the Texas Rules of Civil Procedure, a garnishor must pay the costs of suit plus reasonable attorney's fees to the garnishee if the suit is lost. Consequently, the investigation process should continue until the attorney has "a reasonable likelihood of obtaining a favorable result."<sup>119</sup>

Perhaps the most effective method of obtaining current information concerning the financial status of the principal defendant is the discovery procedure.<sup>120</sup> The pretrial discovery process permits the garnishor to inspect

---

114. *Kreisle v. Campbell*, 89 Tex. 104, 106, 33 S.W. 852, 853 (1896); *Huggins v. Phillips*, 275 S.W. 1084, 1086 (Tex. Civ. App.—Waco 1925, writ *dism'd*).

115. 57 Tex. 555 (1882).

116. *Id.* at 556.

117. "[A] garnishment suit is purely a statutory proceeding, and the provisions of the statute are to be strictly construed." *Jacksboro Nat'l Bank v. Signal Oil & Gas Co.*, 482 S.W.2d 339, 342 (Tex. Civ. App.—Tyler 1972, no writ); *accord*, *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Diamond Chem. Co. v. Sonoco Prods. Co.*, 437 S.W.2d 307 (Tex. Civ. App.—Corpus Christi 1968, no writ).

118. A. GOLDBERG, *COLLECTION OF ACCOUNTS AND JUDGMENTS, TEXAS LAWYERS' PRACTICE GUIDE, CREDITORS' RIGHTS IV-B-1, IV-B-2* (1967).

119. *Id.* at IV-B-5.

120. TEX. R. CIV. P. 166-170. Rule 737 of the *Texas Rules of Civil Procedure* provides:

[T]he plaintiff shall have the right to have the defendant examined on oral interrogatories, either by summoning him to appear for examination before the trial court as in ordinary trials, or by taking his oral deposition in accordance with the

documents and records of the principal defendant prior to the main contest. As an aid in the enforcement of judgments, Rule 621a provides for a similar procedure *after* judgment unless a supersedeas bond has been filed, or a court order precludes such discovery.<sup>121</sup>

#### CONDITIONS FOR THE ISSUANCE OF THE WRIT

The circumstances under which a writ of garnishment may be issued are as follows:

The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts, in the following cases:

1. Where an original attachment has been issued.
2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the defendant has not within his knowledge property in his possession within this State, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.
3. Where the plaintiff has a valid, subsisting judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution, sufficient to satisfy such judgment.<sup>122</sup>

Under subdivision 2, a garnishor may make application for the writ *before* a final judgment has been entered against the principal defendant.<sup>123</sup> Alternatively, the garnishor may decide not to seek the writ until he has obtained a "valid, subsisting judgment."<sup>124</sup>

---

general rules relating thereto.

This bill of recovery is a part of the main proceeding, not an independent suit. An appeal may not be made as a separate cause based solely on the bill of discovery, but it is reviewable by an appeal of the final judgment of the principal suit. *Equitable Trust Co. v. Jackson*, 129 Tex. 2, 101 S.W.2d 552 (1937).

121. TEX. R. CIV. P. 621a. A discussion of the use of this discovery aid is found at 770-72 *infra*.

122. TEX. REV. CIV. STAT. ANN. art. 4076 (1966).

123. TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966). Recently, however, the constitutionality of this subsection was brought into question. In *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported), the court held article 4084 unconstitutional to the extent that it failed to give the principal defendant notice and a hearing before it froze his property then in the possession of the garnishee. Thus, article 4076(2), which permits the plaintiff to obtain a writ *before* judgment in the original suit, would also appear to be unconstitutional.

124. The better approach is to wait until after the final judgment. The reason is two-fold; first, the validity of the garnishment proceeding is dependent upon final judgment so that one may still have to wait for the judgment before the writ is issued. Secondly, because garnishment is an ancillary proceeding, if the main suit ends in a verdict for the principal defendant, the garnishment action will be quashed.

This approach may become mandatory in Texas. The Houston Court of Civil Appeals has held that the retention of the principal defendant's property before a final judgment has been rendered against him, is a violation of due process except in extraordinary

Jurisdiction in garnishment litigation is conferred upon the justice, county and district courts.<sup>125</sup> Because the garnishment suit is ancillary to the principal case, both actions should be brought in the same court.<sup>126</sup> A judgment given in the original suit by a court without proper jurisdiction over the amount or subject matter in controversy is void<sup>127</sup> and will result in the ancillary proceeding also being considered invalid.<sup>128</sup> Furthermore, if the court was without jurisdiction, it is immaterial that the parties consented to have the case heard,<sup>129</sup> or that the issue of jurisdiction was not raised on appeal;<sup>130</sup> in each of these circumstances the original suit will be void. The case of *Murray v. Brisco*<sup>131</sup> offers a good example of the second proposition. In *Murray*, the garnishor had obtained a judgment against the principal defendant in the 56th Judicial District Court in Galveston. He then initiated garnishment proceedings in the 10th Judicial District Court also located in Galveston. On appeal from a judgment refusing to quash the garnishment writ, the issue of jurisdiction was not raised. The court in holding the original suit void, however, stated that the courts of civil appeals "have the authority and duty to consider fundamental error apparent upon the fact of the record though not assigned . . . ." <sup>132</sup>

Venue for the principal suit is controlling and therefore, the garnishment action is subject to the general venue provisions applied to other civil cases.<sup>133</sup> When the garnishee is not a foreign corporation or is an individual

---

situations. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported).

An additional consideration is the possibility that the garnishor may be found liable for damages to the garnishee for wrongful garnishment. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640-41 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942). See generally *Jarvis, Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 TEXAS L. REV. 692 (1963).

125. TEX. REV. CIV. STAT. ANN. art. 4076 (1966).

126. *King & King v. Porter*, 113 Tex. 198, 252 S.W. 1022 (1923); *Buie-Crawford Co. v. Cleburne Nat. Bank*, 111 S.W.2d 830 (Tex. Civ. App.—Waco 1937, no writ).

127. *Kelly v. Gibbs*, 84 Tex. 143, 19 S.W. 563 (1892); *Lopez v. Mexico-Texas Petroline & Asphalt Co.*, 281 S.W. 326 (Tex. Civ. App.—San Antonio 1926, no writ); *Nesom v. City Nat. Bank*, 174 S.W. 715 (Tex. Civ. App.—El Paso 1915, no writ).

128. *Lopez v. Mexico-Texas Petroline & Asphalt Co.*, 281 S.W. 326 (Tex. Civ. App.—San Antonio 1926, no writ) where the court said:

As the original judgment has been held to be erroneous as it is, and because it is made the basis of the garnishment, it must follow, as logically as "night follows day," that it cannot stand alone and must take the same route as the main case.

*Id.* at 327.

129. *Harvey v. Wichita Nat. Bank*, 113 S.W.2d 1022 (Tex. Civ. App.—Fort Worth 1938, no writ).

130. *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947) where the Texas Supreme Court held that any error which was "fundamental error" could be reviewed on appeal notwithstanding that it had not been assigned as error. *Id.* at 203, 205 S.W. 2d at 983.

131. 209 S.W.2d 976 (Tex. Civ. App.—Galveston 1948, no writ).

132. *Id.* at 977. For other problems arising from lack of jurisdiction in garnishment proceedings, see Annot., 41 A.L.R.2d 1093 (1955).

133. TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

who is not a resident of the county where the principal suit is maintained, the case may be transferred to the county of the garnishee's residence.<sup>134</sup> This article, however, is limited to those cases where the garnishor has controverted the garnishee's answer.<sup>135</sup> When the cause has been transferred, the garnishor has an affirmative duty to file a copy of the original judgment, his application for the writ, the answer of the garnishee and the affidavit controverting the answer in the court to which the action is transferred.<sup>136</sup>

Because more than one person may have an interest in the garnished property, the parties to both the principal suit and the garnishment proceeding may be designated as either necessary or proper. In the main suit, those parties whose rights will be directly affected by the judgment are deemed to be necessary parties. In the garnishment action, the garnishor and garnishee usually comprise the only necessary parties.<sup>137</sup> The principal defendant is not, under most circumstances, a necessary party.<sup>138</sup> This fact, however, does not prevent him from asserting any defenses which may exist between himself and the garnishor,<sup>139</sup> nor does it preclude him from appealing an adverse judgment.<sup>140</sup> In those cases where the principal defendant has filed a replevy bond,<sup>141</sup> he does become a party to the proceeding.<sup>142</sup>

The proper parties to the garnishment action, on the other hand, may include anyone claiming an interest in the garnished property.<sup>143</sup> It then

134. TEX. REV. CIV. STAT. ANN. art. 4096 (1966).

135. *Id.*

136. *Id.*

137. *Missouri Pac. Ry. v. Whipker*, 77 Tex. 14, 13 S.W. 639 (1890). The United States Supreme Court in the case of *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), however, held that the failure to give the principal defendant a hearing or notice prior to time of the taking of the garnished property constituted a deprivation of "due process" except in extraordinary situations. *Id.* at 339. It would appear to be the better practice to have the principal defendant served in a prejudgment garnishment action to insure that the constitutional ramifications may be avoided. See *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported).

138. *Missouri Pac. Ry. v. Whipker*, 77 Tex. 14, 15, 13 S.W. 639 (1890). Where a husband or a wife was the defendant in the main suit, however, and there is property involved, both husband and wife may become necessary parties to the garnishment action. *First Nat'l Bank v. Cole*, 264 S.W. 926 (Tex. Civ. App.—Austin 1924, no writ).

139. *Gray Co. v. Ward*, 145 S.W.2d 650, 651 (Tex. Civ. App.—Waco 1940, writ *dism'd jdgmt cor.*).

140. *Phillips v. Interstate Securities Co.*, 250 S.W.2d 444, 447 (Tex. Civ. App.—El Paso 1952, no writ).

141. TEX. R. CIV. P. 664. A discussion of the replevy bond is found at 742-43 *infra*.

142. *Griswold v. Tarbell*, 242 S.W. 324 (Tex. Civ. App.—Amarillo 1922, writ *dism'd*).

143. *F.C. Crane Co. v. Chas. C. Bellar Co.*, 135 S.W.2d 167 (Tex. Civ. App.—Dallas 1939, no writ) where the court stated:

All parties having or claiming an interest in the debt or property due or held by the garnishee should be made parties to the garnishment proceedings, in order that the judgment obtained against the garnishee may be a complete defense in his be-

becomes important for the garnishee to implead any claimants to the property in order that his legal obligations can be ascertained. If the garnishee makes payment to the garnishor and it is later determined that a third party had superior rights to the funds or property in question, the garnishee may be subject to dual liability.<sup>144</sup>

#### APPLICATION FOR THE WRIT

Rule 658 of the Texas Rules of Civil Procedure states that prior to the issuance of the writ:

[T]he plaintiff shall make application therefor, signed by him, stating the facts authorizing the issuance of the writ, and that the plaintiff has reason to believe and does believe, that the garnishee, stating his name and residence, is indebted to the defendant, or that he has in his hands effects belonging to the defendant.

The garnishor is required, by means of an affidavit, to provide sufficient facts to authorize the issuance of the writ. The facts called for are dependent upon the particular basis for which the writ is sought. For example, where the writ seeks to obtain satisfaction of a debt, the garnishor must state that the debt is "just, due and unpaid."<sup>145</sup> Additionally, the garnishor must allege that he believes that the principal defendant has insufficient property within the state to satisfy the debt, and finally, he must swear that the garnishment suit was not instituted with the intent to injure the garnishee.<sup>146</sup>

When the basis of the writ is a judgment,<sup>147</sup> the garnishor's affidavit should provide that a valid and subsisting judgment has been rendered, and that there is insufficient property of the principal defendant subject to execution to secure full satisfaction of the amount of the given judgment.

Once the application for the writ has been filed, the garnishor usually may not amend the affidavit.<sup>148</sup> Omission of one of the statutory requirements,

---

half to subsequent actions to recover the same debt or property.  
*Id.* at 169.

144. *Thompson v. Fulton Bag & Cotton Mills*, 155 Tex. 365, 286 S.W.2d 411 (1956). Therefore, the garnishee should "pay the funds into the court and by interpleader bring into the suit all other claimants thereto in order to protect itself against double liability." *Id.* at 371-72, 286 S.W.2d at 414. See also *Liverpool & London & Globe Ins. Co. v. Lummus Cotton Gin Sales Co.*, 6 S.W.2d 728 (Tex. Comm'n App. 1928, jdgmt adopted); *Hendrick v. Johnston*, 32 S.W.2d 883 (Tex. Civ. App.—Amarillo 1930, no writ).

145. TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966). It may further be a necessity that valid judgment be obtained against the principal defendant before the writ can be issued under this provision. See *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported).

146. TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966).

147. TEX. REV. CIV. STAT. ANN. art. 4076(3) (1966).

148. *East & W. Tex. Lumber Co. v. Warren & Son*, 78 Tex. 318, 320, 14 S.W. 783, 786 (1890); *Abadie v. Gaylor Oil Co.*, 129 S.W.2d 319, 320 (Tex. Civ. App.—Galveston 1939, no writ).

however, will not necessarily invalidate the proceedings if there was substantial compliance.<sup>149</sup> The majority of Texas court decisions have taken a strict view as to what constitutes substantial compliance. For example, in *Gottesman v. Toubin*,<sup>150</sup> the court stated that a writ of garnishment could be quashed where the garnishor failed to allege that the principal defendant did not have sufficient property subject to execution to satisfy the debt.<sup>151</sup> A recent addition to the Rules of Civil Procedure may grant relief for minor defects. Rule 679 provides that:

Clerical errors in the affidavit, bond or writ of garnishment or the officer's return thereof, may . . . (upon application in writing to the court) be amended . . . provided such amendment appears to the judge . . . to be in furtherance of justice.

#### THE GARNISHMENT BOND

When the garnishor applies for the writ of garnishment based upon a debt not yet reduced to judgment, Rule 658a requires that the garnishor execute a bond as a condition precedent to obtaining the writ. The bond must be made payable to the garnishee in an amount double that claimed in the writ as being owed. It may be reduced to an amount double that stated in the garnishee's answer, if the answer is not controverted.<sup>152</sup> The bond must be supported by two or more sureties who may be held jointly and severally liable for any damages.<sup>153</sup> The sureties may not attempt to be held jointly liable. The right of contribution exists, however, for any judgment rendered

---

149. *Camden Fire Ins. Ass'n v. First Nat'l Bank*, 84 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1935, writ dismissed). TEX. R. CIV. P. 679 provides that mere clerical errors may be amended so long as "such amendment appears to the judge or justice to be in furtherance of justice." See also *South Fort Worth State Bank v. Howe*, 361 S.W.2d 447 (Tex. Civ. App.—Fort Worth 1962, no writ) (omission of number and style of the judgment rendered against principal defendant held clerical); *First Nat'l Bank v. Pacific Cotton Agency*, 329 S.W.2d 504 (Tex. Civ. App.—San Antonio 1959, no writ) (failure of affidavit to state the capacity of the garnishor to bring suit held not fatal); *Smith v. Miller*, 298 S.W.2d 845, 847 (Tex. Civ. App.—Galveston 1957, writ refused n.r.e.) (fact that one of garnishors did not sign bond until 18 days after filing was clerical error and could be waived); *Mundy & Co. v. Houston Bank & Trust Co.*, 254 S.W.2d 793, 795 (Tex. Civ. App.—Galveston 1953, no writ) (omission of the word "just" held merely clerical).

150. 353 S.W.2d 294 (Tex. Civ. App.—Houston 1962, no writ).

151. *Id.* at 295-96, citing *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Buerger v. Wells*, 110 Tex. 566, 222 S.W. 151 (1920); *Smith v. City Nat'l Bank*, 140 S.W. 1145 (Tex. Civ. App.—Texarkana 1911, writ refused).

152. TEX. R. CIV. P. 658a. Only one bond is necessary, irrespective of the number of garnishees, if there is only one garnishment suit. *United States Fidelity & Guar. Co. v. Warnell*, 103 S.W. 690, 692 (Tex. Civ. App. 1907, writ refused).

153. TEX. R. CIV. P. 658a; *Commonwealth v. United N. & S. Dev. Co.*, 140 Tex. 417, 422, 168 S.W.2d 226, 229 (1942) where the court held that a bond supported by six corporate sureties which were designated as "several" but not "joint" sureties was not sufficient to satisfy the statute and the writ of garnishment should be quashed.

against them as sureties.<sup>154</sup> When the bond is filed, the officer of the court is charged with approving or disapproving it, but he has no authority to accept a bond which fails to satisfy the strict requirements of the statute.<sup>155</sup> A bond which fails to meet these requirements does not render the proceedings void, but only voidable. The garnishee must assert any objection in a motion to quash or a plea in abatement and the failure to do so may constitute a waiver.<sup>156</sup>

The purpose of the bond is to protect the garnishee from false claims or wrongful garnishment. A garnishment is considered wrongful "if the facts set forth in the garnishor's affidavit . . . are untrue . . . or if the debt or judgment alleged to be the basis for the issuance of the garnishment be non-existent or legally insufficient to support the writ."<sup>157</sup> When wrongful garnishment is found, the garnishee is permitted to recover actual damages<sup>158</sup> with exemplary damages allowed when the garnishment was sought maliciously and without probable cause.<sup>159</sup>

#### SERVICE OF THE WRIT

When all of the above requirements have been completed, "the judge, or clerk, or justice of the peace . . . shall docket the case . . . and shall immediately issue a writ of garnishment directed to the garnishee . . . ." <sup>160</sup>

154. See generally *First Nat'l Bank v. Roberts*, 286 S.W.2d 462 (Tex. Civ. App.—Austin 1956, no writ); cf. TEX. BUS. & COMM. CODE ANN. § 34.04 (1968).

155. *Commonwealth v. United N. & S. Dev. Co.*, 140 Tex. 417, 421-22, 168 S.W.2d 226, 229 (1942). If the error was clerical, it would appear Rule 679 may be applied. E.g., in *Modern Dairy & Creamery Co. v. Blanke & Hank Supply Co.*, 116 S.W. 154, 155 (Tex. Civ. App.—San Antonio 1909, no writ) the court held that where the writ was delivered stating a bond in an amount 30 cents less than double the amount named in the writ, the suit could not be quashed because of the principle of de minimis.

156. *Smith v. Miller*, 298 S.W.2d 845, 847 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.).

157. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942). See also *Sayeg v. Federal Mort. Co.*, 54 S.W.2d 238 (Tex. Civ. App.—Waco 1932, no writ); *Foster v. Bennett*, 152 S.W. 233 (Tex. Civ. App.—Fort Worth 1912, no writ).

158. *O'Hara v. Ferguson Mack Truck Co.*, 373 S.W.2d 507 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.). See generally *Jarvis, Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 TEXAS L. REV. 692 (1963).

159. Both elements, malice and lack of probable cause, must exist before exemplary damages may be awarded. *Ware v. Paxton*, 359 S.W.2d 897, 899 (Tex. Sup. 1962); *O'Hara v. Ferguson Mack Truck Co.*, 373 S.W.2d 507, 510 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); cf. *Woodward v. Tatum*, 277 S.W.2d 943, 945 (Tex. Civ. App.—Waco 1955, no writ); *Thomas v. Callaway*, 251 S.W.2d 921, 924 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

160. Tex. R. Civ. P. 659. Although there is no "due process" problem with this rule in regards to post-judgment garnishment, its relation to prejudgment garnishment was noted in a recent court of civil appeals case:

The rules of civil procedure which outline the process of prejudgment garnishment are constitutionally defective in several respects. Rule 659 provides that the writ



The writ should be directed to the garnishee in his individual capacity and state the name of the principal defendant. The writ is then delivered to the sheriff or constable who serves it upon the garnishee.<sup>161</sup> The sufficiency of the delivery as well as the return of the writ is determined by the same judicial criteria applied in other civil cases.<sup>162</sup> For example, in *Jacksboro National Bank v. Signal Oil & Gas Co.*,<sup>163</sup> the court refused to enforce a default judgment where the sheriff's return did not show the place of the service and failed to state that the writ of garnishment had been executed.<sup>164</sup>

#### THE GARNISHEE'S ANSWER

When the garnishee receives the writ, he must satisfy two requirements. First, the garnishee must appear on or before the Monday following the expiration of 20 days from the date of service (10 days if issued from a justice court).<sup>165</sup> The writ must affirmatively specify the time and place of appearance or else a default judgment rendered thereon will be open to attack.<sup>166</sup> Second, the garnishee must file an answer, which must include a response to four separate interrogatories:

- 1) whether the garnishee was indebted to the principal defendant at the time the writ was served;<sup>167</sup>

---

shall issue at the same time the garnishment proceeding is docketed and that the writ be directed only to the garnishee rather than to the defendant. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported). This fails to give a defendant a hearing or notice prior to his property being taken and is therefore unconstitutional. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

161. TEX. R. CIV. P. 663.

162. TEX. R. CIV. P. 663. *See Fleming-Stitzer Road Bldg. Co. v. H.C. Rominges & Co.*, 250 S.W. 456 (Tex. Civ. App.—El Paso 1923, no writ). The requirements of service have been narrowly construed. *See, e.g., Bankers Life & Cas. Co. v. Watson*, 436 S.W.2d 404 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); *Texaco, Inc. v. McEwen*, 356 S.W.2d 809 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)

163. 482 S.W.2d 339 (Tex. Civ. App.—Tyler 1972, no writ).

164. *Id.* at 341-42; *accord*, *Carlson Boat Works v. Hauck*, 459 S.W.2d 887 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *Watson Van & Storage Co. v. Busse*, 451 S.W.2d 557 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *Diamond Chem. Co. v. Sonoco Prods. Co.*, 437 S.W.2d 307 (Tex. Civ. App.—Corpus Christi 1968, no writ); *Hyltin-Manor Funeral Home, Inc. v. Hill*, 304 S.W.2d 469 (Tex. Civ. App. San Antonio 1957, no writ).

165. TEX. R. CIV. P. 121 provides: "An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him." This does not prevent a garnishee from a foreign state from filing a special appearance. TEX. R. CIV. P. 120a.

166. *Hanson v. Guardian Trust Co.*, 150 S.W.2d 465 (Tex. Civ. App.—Galveston 1941, writ dismissed w.o.j.); *Griswold v. Tarbell*, 242 S.W. 324 (Tex. Civ. App.—Amarillo 1922, writ dismissed w.o.j.). If the garnishee does appear, however, it will waive the defect in the writ. Also, where a garnishee fails to make an objection to the defect in the writ, it will constitute a waiver. *Griswold v. Tarbell*, 242 S.W. 324 (Tex. Civ. App.—Amarillo 1922, writ dismissed w.o.j.).

167. The wording of Rule 659 is "The writ shall command the garnishee to answer . . . what, if anything, he is indebted to the defendant . . ." (Emphasis added). The

2) what effects of the principal defendant did the garnishee have when the writ was served;

3) whether the garnishee has knowledge of any other persons who are indebted to the principal defendant;

4) whether the garnishee has knowledge of any other persons who have in their possession effects of the principal defendant.<sup>168</sup> The garnishee is further required to answer "under oath, in writing, and signed by him," and that his answers be truthful.<sup>169</sup>

Upon the service of the writ the garnishee may then be held liable for the funds or effects in his possession.<sup>170</sup> Until that time the garnishee is not deemed to have notice of the garnishment suit and may deliver the funds or effects to the principal defendant before proper service in order to relieve himself of the liability. In *Pearson Grain Co. v. Plains Trucking Co.*,<sup>171</sup> for example, the court concluded that delivery of a check owing to the defendant prior to service of the writ would defeat the garnishment suit. Once delivery has been accomplished, the foundation of the suit had been disposed of and the writ must be dismissed.<sup>172</sup> Upon service, however, the garnishee is liable not only for those funds in his possession at that time, but also for all funds or effects received by him until the time of his answer.<sup>173</sup>

---

phrase "what, if anything" has been construed to include not only *if* he is indebted to the principal defendant, but also *in what amount*. *Burkett v. Gleney*, 371 S.W.2d 412, 415 (Tex. Civ. App.—Houston 1963, writ *dism'd w.o.j.*).

168. TEX. R. CIV. P. 659. An answer which fails to answer these questions is defective. For example, an answer that attempts to be evasive by not disclosing whether or not the garnishee had any property of the principal defendant or was indebted to him has been held sufficient to obtain jurisdiction over the garnishee, but defective as an answer. *Oklahoma Petro. Gas. Co. v. Nolan*, 253 S.W. 650 (Tex. Civ. App.—Fort Worth 1923, writ *ref'd*).

169. TEX. R. CIV. P. 665. If the answer is not sworn to, the garnishee should be given an opportunity to amend "under the spirit . . . of the garnishment statutes." *Durfee Mineral Co. v. City Nat'l Bank*, 236 S.W. 516, 519 (Tex. Civ. App.—Austin 1921, writ *dism'd*). See also TEX. R. CIV. P. 679.

170. TEX. REV. CIV. STAT. ANN. art. 4084 (1966) recites: "From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects . . ." A "good faith" transfer of the goods will not provide a defense, therefore, a garnishee who transfers any property after service does so at his peril. *Westridge Villa Apartments v. Lakewood Bank & Trust Co.*, 438 S.W.2d 891, 895 (Tex. Civ. App.—Fort Worth 1969, writ *ref'd n.r.e.*); *Pure Oil Co. v. Walsh-Woldert Motor Co.*, 36 S.W.2d 802 (Tex. Civ. App.—Texarkana 1931, writ *dism'd*). The writ of garnishment can subject the garnishee to liability only for property in his possession at the time of service. *Adams v. Williams*, 112 Tex. 469, 248 S.W. 673 (1923); *First Nat'l Bank v. Lampman*, 442 S.W.2d 858 (Tex. Civ. App.—Eastland 1969, writ *ref'd n.r.e.*). But see *First Nat'l Bank v. Banco Longoria*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ *ref'd n.r.e.*).

171. 494 S.W.2d 639 (Tex. Civ. App.—Amarillo 1973, writ *ref'd n.r.e.*).

172. *Id.* at 642.

173. *First Nat'l Bank v. Banco Longoria*, 356 S.W.2d 192, 195-96 (Tex. Civ. App.—San Antonio 1962, writ *ref'd n.r.e.*); *Cooper v. Cocke*, 145 S.W.2d 275, 279 (Tex. Civ. App.—Amarillo 1940, no writ); *Planters' & Mechanics' Bank v. Floeck*, 43 S.W. 589 (Tex. Civ. App. 1897, writ *ref'd*).

What would happen, however, if the garnishee, realizing that more funds of the principal defendant will be arriving shortly, files his answer immediately after service to avoid the increased liability? The court in *First National Bank v. Banco Longoria*,<sup>174</sup> provided the garnishor with a remedy: if the garnishor has reason to believe that the garnishee will receive more funds before the time to answer, he may except to the answer and ask the court to require that the garnishee answer fully.<sup>175</sup> Such a motion by the garnishor does not constitute a denial of the answer.<sup>176</sup> The above rules have been applied in Texas to both prejudgment and post-judgment garnishment. On January 9, 1974, however, the Houston Court of Civil Appeals held that in cases arising out of a debt (prejudgment), the garnishee's inability to return property to the principal defendant after the writ is served, deprived the defendant of property without due process of law and was therefore unconstitutional.<sup>177</sup>

The requirement in the garnishee's answer that he inform the court of any other persons within his knowledge who are indebted to the principal defendant has been the subject of criticism.<sup>178</sup> The critics contend that it makes an informer of the garnishee and also that it is virtually impossible to determine if he is telling the truth.<sup>179</sup> If the garnishee fails to answer this inquiry, it will not make his answer insufficient unless the garnishor takes

174. 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.).

175. *Id.* at 196.

176. *Gray v. Armour & Co.*, 129 Tex. 512, 104 S.W.2d 486 (1937).

177. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported). The court limited its decision to only one statute, TEX. REV. CIV. STAT. ANN. art. 4084 (1966) when it concluded: "Article 4084, which freezes property after the writ of garnishment is served, is thus the only statute or article here examined which is unconstitutional, and only to the extent that it freezes property without notice and hearing before judgment on the original claim." *Id.* at 5-6. Earlier statements made by the court leave in doubt other statutes as well as some rules of civil procedure. For example, TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966) and TEX. R. CIV. P. 659, 664, 668. The court cited as authority *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) and the Texas decision is certainly in line with these cases. The court added, however, that a prejudgment remedy which failed to provide notice and a hearing before a taking of property was not unconstitutional if an "extraordinary situation" was presented. For example, if it involved "an important governmental or general public interest," or there was "a special need for very prompt action," or where the state needed to keep "strict control over its monopoly of legitimate force." *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, Docket No. 902, Tex. Civ. App.—Houston [14th Dist.], January 9, 1974 (not yet reported).

178. See, e.g., *Lowe, Collection of Debts by Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in CREDITORS' RIGHTS IN TEXAS 242 (J. McKnight ed. 1963).

179. If the garnishee fails to respond to a portion of this inquiry, the garnishee's answer may still be sufficient. *Gray v. Armour & Co.*, 129 Tex. 512, 515, 104 S.W. 2d 486, 487 (1937). Other courts, however, have reasoned that an incomplete answer is no answer and have rendered judgments against the garnishee. *Freeman v. Miller*, 51 Tex. 443 (1879); *Norton v. B. & A. Drilling Co.*, 34 S.W.2d 1095 (Tex. Comm'n

exception.<sup>180</sup> In such a case, the garnishee should be given an opportunity to amend.<sup>181</sup>

Once the garnishee has filed his answer, one of three situations may occur: (1) The garnishee will be discharged;<sup>182</sup> (2) he will be judged indebted to the garnishor for a certain amount<sup>183</sup> or for certain effects;<sup>184</sup> (3) or the garnishor will controvert the answer.<sup>185</sup> If the garnishee claims that he is not indebted to the principal defendant, nor in possession of any effects of the defendant, Rule 666 provides that the garnishee shall be discharged and the suit dismissed.<sup>186</sup> Because he has no funds of the principal defendant in his possession, there can be no liability. If the garnishor believes that the answer is not true or is not complete, he may controvert this answer, thus preventing such a discharge.<sup>187</sup> If the answer admits an indebtedness, the court may give judgment for the garnishor in the amount so admitted or found by the court to be owing. If the judgment rendered in the primary suit is for a lesser sum than that alleged in the garnishee's answer, the court will decrease the garnishee's liability accordingly.<sup>188</sup>

A garnishor who is not satisfied with any portion of the answer may file a controverting plea known as a traverse which may be filed at any time before the taking of a default judgment.<sup>189</sup> By traverse, a garnishor states that "he has good reason to believe and does believe that the answer of the garnishee is incorrect."<sup>190</sup> The affidavit must specify the particular grounds on which he is contesting. The purpose of the traverse is to establish the precise issues upon which the parties are in disagreement in order to permit the court to make a final determination. Consequently, where the answer adequately specifies the controversies to be decided, a traverse is un-

---

App. 1931, jdgmt adopted); *Kentucky Oil Corp. v. David*, 285 S.W. 290 (Tex. Comm'n App. 1926, jdgmt adopted).

180. *First Nat'l Bank v. Banco Longoria*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.).

181. *Gray v. Armour & Co.*, 129 Tex. 512, 104 S.W.2d 486 (1937).

182. TEX. R. CIV. P. 666.

183. TEX. R. CIV. P. 668.

184. TEX. R. CIV. P. 669.

185. TEX. R. CIV. P. 673.

186. *See also Goodson v. Carr*, 428 S.W.2d 875 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). The garnishor has the burden to prove facts demonstrating the contrary. *Farmers Nat'l Bank v. Carmony*, 62 S.W.2d 1115, 1117 (Tex. Civ. App.—Eastland 1933, no writ).

187. TEX. R. CIV. P. 673. Where no controverting affidavit is filed, and the garnishee denies that he is indebted, a default judgment rendered in favor of the garnishor is void and the garnishee must be discharged. *Pinkston v. Victoria Bank & Trust Co.*, 215 S.W.2d 245 (Tex. Civ. App.—Waco 1948, no writ).

188. TEX. R. CIV. P. 668.

189. *First Nat'l Bank v. Foley*, 26 S.W.2d 314 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

190. TEX. R. CIV. P. 673. *See also Industry State Bank v. Wylie*, 493 S.W.2d 293 (Tex. Civ. App.—Beaumont 1973, no writ).

necessary.<sup>191</sup>

#### DEBTOR'S RIGHT TO REPLEVY

In some instances, the principal defendant may ask that the effects held by the garnishee be returned and not subjected to the garnishment proceeding. If the garnishee should return the property after receiving the garnishment writ, however, he will remain liable for the value of the property possessed by him from the date of service until the time of answer. Rule 664 provides for the replevy bond—a means whereby the principal defendant may reacquire his property without the garnishee incurring the liability. The requirements necessary to effect the bond are similar to those required of the garnishor in the garnishment bond. The principal defendant must supply two or more sureties who will be bound jointly and severally for any sum rendered against the defendant. The bond must be made payable to the garnishor in a sum equal to twice the amount claimed in the writ. Whereas the garnishment bond offers protection to the garnishee for wrongful garnishment, the replevy bond insures that the amount of the judgment will be satisfied. It may be filed at any time before judgment in the garnishment proceeding.<sup>192</sup>

By filing a replevy bond, the principal defendant has not waived any right to defend or attack the proceedings in the main case.<sup>193</sup> The filing of a bond, however, may constitute an appearance which will waive all nonjurisdictional defects.<sup>194</sup> After the property has been replevied, the principal defendant is estopped to deny any allegations concerning the ownership of the property,<sup>195</sup> or that he was the defendant in the principal case.<sup>196</sup> Only the principal defendant, however, may take advantage of the bond.<sup>197</sup> When a valid bond is filed, the garnishee is relieved of any liability and

---

191. *E.g.*, *First Nat'l Bank v. Foley*, 26 S.W.2d 314, 317 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

192. TEX. R. CIV. P. 664.

193. *Cleveland v. San Antonio Bldg. & Loan Assn.*, 148 Tex. 211, 223 S.W.2d 226 (1949) holding that Rule 664 does not limit defendant's right to quash the writ, but merely emphasizes that if he files a replevy bond, he still may assert any defenses. *See First Nat'l Bank v. Davidson*, 67 S.W.2d 456 (Tex. Civ. App.—El Paso 1934, writ dism'd); *First Nat'l Bank v. Guinn*, 57 S.W.2d 880 (Tex. Civ. App.—Eastland 1933, no writ). *Contra*, *Margerum v. Sopher*, 46 S.W.2d 457 (Tex. Civ. App.—Amarillo 1932, writ ref'd); *Wasson v. Harris*, 209 S.W. 758 (Tex. Civ. App.—Amarillo 1918, no writ).

194. *Wise & Jackson v. Nott*, 283 S.W. 1110 (Tex. Civ. App.—Amarillo 1926, no writ); *Griswold v. Tarbell*, 242 S.W. 324 (Tex. Civ. App.—Amarillo 1922, writ dism'd).

195. *Kelsey v. Lietz*, 38 S.W.2d 108 (Tex. Civ. App.—Waco 1931, writ dism'd); *Houseman v. Guaranty Sec. Co.*, 293 S.W. 304 (Tex. Civ. App.—El Paso 1927, no writ).

196. *Kelsey v. Lietz*, 38 S.W.2d 108 (Tex. Civ. App.—Waco 1931, writ dism'd).

197. *First Nat'l Bank v. Wagner Supply Co.*, 9 S.W.2d 474 (Tex. Civ. App.—Fort Worth 1928, no writ).

is retained merely as a party *pro forma*.<sup>198</sup> The possibility of his being liable is, however, not at an end. Where the principal defendant has omitted a necessary requirement of the bond, the garnishor's remedy is to have the bond quashed. If successful, the liabilities existing prior to the filing of the bond will be revived.<sup>199</sup> Consequently, the garnishee must relinquish the property with caution because if the bond is subsequently declared invalid he will not be relieved of his responsibility to make payment to the garnishor.<sup>200</sup>

#### TRIAL, JUDGMENT AND ENFORCEMENT

The ultimate issue in the garnishment proceeding is simply whether or not the garnishee is indebted to or retaining property of the principal defendant. The questions in controversy in the main suit are not carried over to the garnishment action.<sup>201</sup> Where the garnishee has filed an answer which has not been controverted, the court may enter a decree without a trial because there are no issues to be adjudicated.<sup>202</sup> In situations where a traverse has been filed, the court will formulate the issues needed for disposal of the suit.<sup>203</sup>

After the issues have been formulated by the court, the garnishor must sustain the burden of proof. He must provide sufficient evidence that the

198. *Thomas v. Buehler*, 254 S.W.2d 223 (Tex. Civ. App.—Austin 1953, no writ); *Texas Nat'l Bank v. First Nat'l Bank*, 1 S.W.2d 717 (Tex. Civ. App.—Waco 1927, no writ); *Griswold v. Tarbell*, 242 S.W. 324 (Tex. Civ. App.—Amarillo 1922, writ dismissed).

199. For example, a bond which is for a sum less than double the amount stated in the writ is ineffective to relinquish the garnishee's liability. *Texas Nat'l Bank v. First Nat'l Bank*, 1 S.W.2d 717, 719 (Tex. Civ. App.—Waco 1927, no writ). Moreover, a replevy bond which fails to meet the statutory requirements will not support a summary judgment. *Texas Nat'l Bank v. First Nat'l Bank*, 1 S.W.2d 717 (Tex. Civ. App.—Waco 1927, no writ); *accord*, *White v. Suttle*, 255 S.W. 253 (Tex. Civ. App.—Waco 1923, no writ).

200. *See, e.g.*, *United States v. Fidelity & Guar. Co. v. Daniels*, 107 S.W.2d 400 (Tex. Civ. App.—Texarkana 1937, no writ) where the court noted:

If a garnishee surrenders to a judgment debtor impounded funds by virtue of a replevy bond which does not protect the garnishee, he does so at garnishee's risk, for which the plaintiff can recover directly against the garnishee.

*Id.* at 402. The sureties to the bond become liable only to the extent that the debtor is so held. They maintain their rights of subrogation and contribution except when the debtor is deceased or "notoriously insolvent." *Lowe, Collection of Debts by Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in *CREDITORS' RIGHTS IN TEXAS* 245 (J. McKnight ed. 1963).

201. The garnishment suit usually takes the form of a separate action. Under some situations, however, the main case may be combined with the garnishment proceeding to avoid a multiplicity of suits. For example, in *Reinertsen v. E.W. Bennett & Sons*, 185 S.W. 1027 (Tex. Civ. App.—El Paso 1916, writ refused) the court permitted a combination of the original suit and the garnishment proceeding where the garnishee and the defendant treated the garnished property as a trust fund.

202. *TEX. R. CIV. P.* 666; *Gray v. Armour & Co.*, 129 Tex. 512, 104 S.W.2d 486 (1937); *Goodson v. Carr*, 428 S.W.2d 875 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ refused n.r.e.); *Snyder Nat'l Bank v. Pinkston*, 219 S.W.2d 606 (Tex. Civ. App.—Dallas 1949, no writ).

203. *TEX. R. CIV. P.* 674, 676.

garnishee's answer is incorrect, and introduce facts entitling him to judgment.<sup>204</sup> The test of liability on the part of the garnishee is whether the principal defendant could have successfully obtained a judgment against him.<sup>205</sup> Once the garnishor establishes his allegations by clear and convincing evidence, the burden shifts to the garnishee to prove the statements made in the answer.

In addition to the situations where a judgment is rendered upon the garnishee's uncontroverted answer<sup>206</sup> or a judgment is entered following a trial on the merits, Rule 667 provides for a method of judgment where no answer has been filed by the garnishee:

If the garnishee fails to file an answer . . . at or before the time directed in the writ, it shall be lawful for the court, at any time after judgment shall have been rendered against the defendant, and on or after appearance day, to render judgment by default . . . against such garnishee for the full amount of such judgment . . . .

The garnishee may avoid the default judgment by submitting an answer at any time before the final judgment in the principal case, or appearance day in the garnishment proceeding.<sup>207</sup> Moreover, failure to give sufficient notice of the suit to the garnishee will preclude any valid default judgment from being rendered.<sup>208</sup>

Before a judgment can be rendered in *any* garnishment proceeding, the garnishor must have procured a valid and subsisting judgment in the principal suit. Furthermore, the verdict must be final.<sup>209</sup> If the original suit has

204. The garnishee's answer presents a prima facie defense to any statements made in it. In order to recover, the garnishor must overcome the answer. *Goodson v. Carr*, 428 S.W.2d 875 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); *Jenschke v. Burg*, 92 S.W.2d 1095 (Tex. Civ. App.—El Paso 1936, no writ).

205. *Pearson Grain Co. v. Plains Trucking Co.*, 494 S.W.2d 639 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *Becker v. Cooper*, 22 S.W.2d 1083, 1085 (Tex. Civ. App.—Waco 1929, writ dism'd). The garnishor may enforce any rights that the principal defendant could enforce but no greater rights. *Pace v. Pierson*, 145 S.W.2d 929, 931-32 (Tex. Civ. App.—Eastland 1940, no writ).

206. TEX. R. CIV. P. 666.

207. TEX. R. CIV. P. 667. *See also Consolidated Gas. Co. v. Jarecki Mfg. Co.*, 72 S.W.2d 351, 353 (Tex. Civ. App.—Eastland 1934), *aff'd*, 129 Tex. 644, 105 S.W.2d 663 (1937), where the court held that a garnishee could prevent a default judgment by entering an answer at any time before judgment was rendered against him.

208. *Investor's Diversified Serv., Inc. v. Bruner*, 366 S.W.2d 810 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.); *First Nat'l Bank v. Pacific Cotton Agency*, 329 S.W.2d 504 (Tex. Civ. App.—San Antonio 1959, no writ) (court disallowed a default judgment rendered within 10 days after writ of garnishment was filed). *See also* TEX. R. CIV. P. 107, 124. When the garnishee files an answer that is inadequate, however, this will not preclude a valid default judgment in favor of the garnishor. *Investors Diversified Serv., Inc. v. Bruner*, 366 S.W.2d 810, 814 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

209. *See, e.g., Clapper v. Petrucci*, 497 S.W.2d 120 (Tex. Civ. App.—Austin 1973, no writ); *Southern Pipeline Constr. Co. v. Humble Oil & Ref. Co.*, 496 S.W.2d 248 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *Weinstein v. Wilhide Equip. Co.*, 397 S.W.2d 94 (Tex. Civ. App.—Tyler 1965, no writ).

been appealed, it is not final for garnishment purposes. It is only when all the rights of the parties in the main action have been determined that a valid final judgment may be proven by the garnishor.

The method of enforcing a valid garnishment judgment is dependent upon the type of property that forms the basis of the writ. Where the suit is to satisfy a money judgment, the garnishee must pay the amount of the judgment or "execution shall issue thereon in the same manner and under the same conditions as is or may be provided for . . . in other cases."<sup>210</sup> A judgment upon the effects of the principal defendant retained by the garnishee is enforced by providing for a sale of such effects to satisfy the claim.<sup>211</sup> Upon refusal by the garnishee to deliver the property in question to the sheriff, the court may hold the garnishee in contempt and imprison him until delivery of the goods is made.<sup>212</sup>

Channels of appeal are made available to any party to the garnishment proceeding who is dissatisfied with the outcome. An appeal will be allowed for cases initiated in a justice court if the amount of the judgment exceeds \$20. The appeal in such cases is heard as a trial de novo in the county court. Motions made by the parties, such as a motion to quash the writ, are appealable and the general rules of appellate procedure will apply. No appeal, however, can be made from a determination to transfer the venue for the suit under Article 4096.<sup>213</sup>

#### CONCLUSION

The process of garnishment provides a viable means through which the courts can prevent a multiplicity of suits by allowing a creditor of the principal defendant to recover what is owed to him through direct litigation with one who is indebted to the defendant. Additionally, the Texas Legislature and the courts have established strong measures to guarantee that the defendant-debtor or the garnishee is required to give up only that property or money which constitutes his true indebtedness by providing an action for wrongful garnishment to protect him from false accusations<sup>214</sup> and

210. TEX. R. CIV. P. 668. *Daniel v. East Texas Theaters*, 127 S.W.2d 240 (Tex. Civ. App.—Fort Worth 1939, writ dism'd jdgmt cor.).

211. TEX. R. CIV. P. 669. "The sale so ordered shall be conducted in all respects as other sales of personal property under execution; and the officer making such sale shall execute a transfer of such effects or interest to the purchaser, with a brief recital of the judgment of the court under which the same was sold." TEX. R. CIV. P. 672.

212. TEX. R. CIV. P. 670; *Holloway Seed Co. v. City Nat'l Bank*, 92 Tex. 187, 191, 47 S.W. 95, 97 (1898).

213. For a further discussion see generally *Lowe, Collections of Debts by Extraordinary Proceedings: Attachment, Garnishment, Sequestration and Receivership*, in CREDITORS' RIGHTS IN TEXAS 249 (J. McKnight ed. 1963).

214. Comment, *Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 TEXAS L. REV. 692, 704-708 (1963).



by setting out certain statutory exemptions to relieve him from unnecessary financial burden. It is imperative, however, that the attorney use diligence to insure that in his pursuit of the remedies offered by the writ of garnishment, he has strictly complied with each statutory requirement. Only in this way will the combination of safeguards and benefits to be derived from the writ be maintained.

While the writ of garnishment is instrumental in seizing and preserving property or funds of the debtor in the possession of third parties, and may prove to be an effective tool for collecting an unsatisfied judgment, the judgment creditor may eventually be forced to resort to execution and sale of the defendant-debtor's property. Such a situation may result where the garnishee refuses to pay the amount of the judgment. The situation may also arise, independent of any garnishment proceeding, as the initial attempt to collect an unsatisfied judgment.

#### PROPERTY SUBJECT TO EXECUTION

The writ of execution,<sup>215</sup> authorizes the sheriff to levy upon any real and personal property of the debtor within that officer's county.<sup>216</sup> In Texas, with certain exceptions, all real and personal property is subject to execution based upon a valid judgment rendered in a county, district, or justice court.<sup>217</sup> A writ of execution, derived from such judgment, authorizes the sheriff to levy only upon the debtor's non-exempt property located within that officer's county.<sup>218</sup>

Article XVI of the Texas Constitution provides that no property may be executed against if it is specifically exempted by statute.<sup>219</sup> The specific exemptions provided for have been continuously expanded to meet the changing characteristics of property.<sup>220</sup> The purpose of exempting certain prop-

215. See generally TEX. R. CIV. P. 621-656.

216. TEX. R. CIV. P. 637; *Miller v. Dunagan*, 123 S.W.2d 363, 364 (Tex. Civ. App.—El Paso 1938, writ dismissed).

217. See TEX. REV. CIV. STAT. ANN. art. 5449 (1958); TEX. R. CIV. P. 637. See also Cox, *Judgment Liens*, in CREDITORS' RIGHTS IN TEXAS 286 (J. McKnight ed. 1963).

218. See TEX. REV. CIV. STAT. ANN. arts. 3832-3859 (1966 & Supp. 1974). See also D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 324 (State Bar of Texas 1970); McKnight, *Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 23 (J. McKnight ed. 1963); G. RAMSEY, COMMERCIAL COLLECTION MANUAL 22 (State Bar of Texas 1972).

219. TEX. CONST. art. XVI, §§ 49, 50, 51; TEX. REV. CIV. STAT. ANN. arts. 3832-3859 (1966 & Supp. 1974).

220. E.g., *Capitol Aggregates, Inc. v. Walker*, 448 S.W.2d 830, 837 (Tex. Civ. App.—Austin 1969, writ refused n.r.e.), citing *Low v. Tandy*, 70 Tex. 745, 8 S.W. 620 (1888). This expanded view can be seen in the court's treatment of various articles such as a diamond ring as wearing apparel in *First Nat'l Bank of Eagle Lake v. Robinson*, 124 S.W. 177, 179 (Tex. Civ. App. 1909, no writ) or treating a piano as household furniture as the court did in *Alsop v. Jordan*, 69 Tex. 300, 302, 6 S.W. 831, 832 (1887); see *Castleberry, Mobile Home Financing*, 5 ST. MARY'S L.J. 259, 269-70 (1973). Although the exemption statutes do not specifically exempt these items, the

erty from execution is to insure that the property necessary to the debtor's profession, trade, and the preservation of his family is always available for his use.<sup>221</sup> The courts have consistently held that these exemption statutes should be liberally construed in favor of the debtor,<sup>222</sup> and that such a construction is necessary in light of the legislature's intentions in enacting the statutes.<sup>223</sup> Where there is doubt as to the validity of the debtor's claim, the property is generally held exempt.<sup>224</sup>

#### SALE OF HOMESTEAD

The most significant of all the exemptions is the homestead. The Texas Constitution provides that a 200 acre rural homestead or a \$10,000 urban lot (not including improvements existing at the declaration of the homestead) cannot be subjected to execution, and a forced sale of the homestead is void.<sup>225</sup> Any excess, however, of the 200 acre rural homestead or the \$10,000 lot in an urban homestead may be levied upon and sold at an execution sale.<sup>226</sup>

If the homestead is rural, the excess acreage may easily be isolated from the 200 acres and sold under execution.<sup>227</sup> It is, however, sometimes necessary to sell the entire lot of an urban homestead in order to extract the excess amount of lot value.<sup>228</sup> In *Whiteman v. Burkey*,<sup>229</sup> the court explained

---

courts have interpreted such items as falling within the exempt categories; *Betz v. Maier*, 33 S.W. 710, 712 (Tex. Civ. App. 1896, no writ). *Contra*, *Meritz v. Palmer*, 266 F.2d 265, 268 (5th Cir. 1959). See also Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision*, 35 TEXAS L. REV. 1047 (1957).

221. *Reconstruction Fin. Corp. v. Burgess*, 155 S.W.2d 977, 980 (Tex. Civ. App.—Waco 1941, writ ref'd); *Malone v. Kennedy*, 272 S.W. 509, 510 (Tex. Civ. App.—Beaumont 1925, no writ), quoting *Cone v. Lewis*, 64 Tex. 331 (1885).

222. *Carson v. McFarland*, 206 S.W.2d 130, 132 (Tex. Civ. App.—San Antonio 1947, writ ref'd); accord, *Betz v. Maier*, 33 S.W. 710, 712 (Tex. Civ. App. 1896, no writ). See also Comment, *Estoppel of Husband and Wife to Claim Constitutional Protection of their Homestead*, 25 TEXAS L. REV. 76, 81 (1947).

223. *Carson v. McFarland*, 206 S.W.2d 130, 132 (Tex. Civ. App.—San Antonio 1947, writ ref'd).

224. *Id.* at 132.

225. TEX. CONST. art. XVI, § 51; TEX. REV. CIV. STAT ANN. art. 3833 (Supp. 1974); *Atkins v. Schmid*, 129 S.W. 412 (Tex. Civ. App.—Dallas 1939, no writ); see *Ward v. Braun*, 417 S.W.2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ) where the court stated: "[T]he homestead may be so encumbered with liens that its permanency as a home may be defeated at the will of the lienholder, in which case the widow may have an allowance in lieu of the exemption." *Id.* at 892.

226. *Clement v. First Nat'l Bank*, 115 Tex. 342, 350, 282 S.W. 558, 561 (1926); see TEX. REV. CIV. STAT. ANN. art. 3844 (1966). See McSwain, *The Texas Business Homestead*, 15 BAYLOR L. REV. 39, 53-54 (1963) for a discussion of the non-exempt, excess portion of the business urban homestead.

227. *Beall v. Hollingsworth*, 46 S.W. 881 (Tex. Civ. App. 1898, no writ); accord *White v. Glenn*, 138 S.W.2d 914, 919 (Tex. Civ. App.—Amarillo 1940, writ dism'd jdgmt cor.).

228. *Harrison v. First Nat'l Bank*, 224 S.W. 269, 275 (Tex. Civ. App.—Fort Worth 1920), *aff'd*, 238 S.W. 209 (Tex. Comm'n App. 1922, jdgmt adopted).

229. 286 S.W. 350 (Tex. Civ. App.—Galveston 1926, no writ). It should be noted

the technique used in segregating an urban excess. The values of the lot and the improvements must first be determined; and if there is an excess value in the lot, over the statutory exemption, it will be awarded to the creditor.<sup>230</sup> When it becomes necessary to sell the homestead to effect a partition of the excess, "the proceeds of such sale should be apportioned to the improvements and the lot in accordance with the respective values found by the trial court . . . ."<sup>231</sup> If no such excess exists, the defendant is allowed to maintain his homestead right without interruption by sale.

When the homestead has been abandoned, it ceases to be exempt from execution.<sup>232</sup> Likewise, whenever the homestead is encumbered by a purchase money mortgage, a mechanic or builder's lien, or a tax lien, the exempt status of the property is relinquished.<sup>233</sup> The judgment debtor is often faced with the threat of having his partly exempt homestead sold through an execution sale. This constant intimidation will usually result in a delinquent judgment being satisfied before the creditor resorts to the sale of the debtor's homestead.<sup>234</sup>

#### TRUSTS

A popular method used to exempt property from creditors is the testamentary trust.<sup>235</sup> The transfer of property into a trust, however, does not automatically exempt the devisee's property. Once the beneficiary acquires a present vested interest, that interest may be levied upon and alienated from the beneficiary-judgment debtor.<sup>236</sup> The estate must be of a determinable and certain character so as not to defeat the purpose of the trust,<sup>237</sup> and so as not to subject the execution purchaser to a sale of uncertain title to property.<sup>238</sup>

---

that *Whiteman* deals specifically with the problem of a forced sale by the children of a deceased wife against the surviving husband and father, but the same law may be applied to a debtor-creditor relationship. *Id.* at 351.

230. *Id.* at 351.

231. *Id.* at 351.

232. *Harrison v. First Nat'l Bank*, 224 S.W. 269, 276 (Tex. Civ. App.—Fort Worth 1920), *aff'd*, 238 S.W. 209, 212 (Tex. Comm'n App. 1922, jdgmt adopted).

233. *Oakwood State Bank v. Durham*, 21 S.W.2d 586, 588 (Tex. Civ. App.—Waco 1929, no writ). A judgment lien attaches to property on the date it ceased to be homestead and becomes subject to sale. See TEX. CONST. art. XVI, § 50.

234. G. RAMSEY, COMMERCIAL COLLECTIONS MANUAL 22 (State Bar of Texas, 1972).

235. See *Time Sec. v. West*, 324 S.W.2d 583, 586 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

236. *Little v. Deaton*, 416 S.W.2d 828, 832 (Tex. Civ. App.—Eastland 1967, no writ); see *Estes v. Estes*, 267 S.W. 709, 711 (Tex. Comm'n App. 1924, jdgmt adopted).

237. *Gamble v. Dabney*, 20 Tex. 69, 77 (1857); *accord*, *Chase v. York County Sav. Bank*, 89 Tex. 316, 36 S.W. 406 (1896).

238. *Eubank v. Moore*, 297 S.W. 791, 794-95 (Tex. Civ. App.—Amarillo 1927, *rev'd on other grounds*, 15 S.W.2d 567 (Tex. Comm'n App. 1929, jdgmt adopted)).

It is well settled, however, that a creditor of a beneficiary may not execute upon any part of a spendthrift trust<sup>239</sup> in the hands of a trustee.<sup>240</sup> In *Hoffman v. Rose*,<sup>241</sup> a case involving a spendthrift trust, the court discussed a seizure of the corpus of the estate in the hands of a trustee, and a sale of the interest of the beneficiary without disturbing the trustee during the life of the trust.<sup>242</sup> The court reasoned that the purpose of the testator would be defeated by the sale of any part of the corpus of a spendthrift trust.<sup>243</sup> While the legal title is vested in the trustee for the life of the trust, the interest of the beneficiary may not be subjected to execution because it would disrupt the interest of the settlor.<sup>244</sup>

In Texas, however, spendthrift trusts may be executed upon when the claim is for child support.<sup>245</sup> The majority of other jurisdictions recognize execution on spendthrift trusts when claims are for necessities furnished the beneficiary, services or materials furnished which preserve the interest of the beneficiary, and government claims as well as support claims.<sup>246</sup>

#### PROPERTY AND INTEREST OF A DECEASED, HEIR, AND DEVISEE

When a judgment debtor dies and judgment is pending, unsatisfied execution may not issue against the decedent's estate without the proper procedure.<sup>247</sup> To obtain any cash that the decedent may have had in order to satisfy the judgment, the creditor must go through the probate court rather than directly levying upon the property of the deceased.<sup>248</sup> The real and personal property of the deceased other than cash is obtained by filing an affidavit in the court where the appointment of the estate's representative is made.<sup>249</sup>

---

239. As to the general characteristics of a spendthrift trust, the court stated in *Lindsey v. Rose*, 175 S.W. 829, 831 (Tex. Civ. App.—Austin 1915, writ ref'd) that under this doctrine . . . it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts.

240. *Hines v. Sands*, 312 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1958, no writ), citing *Hoffman v. Rose*, 217 S.W. 424 (Tex. Civ. App.—Austin 1919, writ ref'd).

241. 217 S.W. 424 (Tex. Civ. App.—Austin 1919, writ ref'd).

242. *Id.* at 427.

243. *Id.* at 427. See also *Gamble v. Dabney*, 20 Tex. 69 (1857).

244. *Hoffman v. Rose*, 217 S.W. 424, 427 (Tex. Civ. App.—Austin 1919, writ ref'd).

245. *Lucas v. Lucas*, 365 S.W.2d 372, 376 (Tex. Civ. App.—Beaumont 1962, no writ).

246. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

247. *Mackey v. Lucey Prods. Corp.*, 150 Tex. 188, 190, 239 S.W.2d 607, 608 (1951). See also TEX. R. CIV. P. 625 (money of deceased); TEX. R. CIV. P. 626 (property of deceased).

248. TEX. R. CIV. P. 625.

249. See TEX. R. CIV. P. 626. The court in *Mackey v. Lucey Prods. Corp.*, 150 Tex. 188, 190, 239 S.W.2d 607, 608 (1951) noted that the property transmitted through

While the estate of a deceased debtor may be executed upon through the procedure indicated above, the interest of the heir, devisee, or legatee in the estate may also be subjected to execution by their creditors.<sup>250</sup> A creditor of the devisee may execute on the personal and real property of the devisee, but his claim is subordinated to the debts of the decedent's estate.<sup>251</sup> Although the interest may be defeated by another creditor of the administration, "this possibility does not change the character of the interest so as to render it exempt from execution."<sup>252</sup>

#### PROPERTY IN CUSTODIA LEGIS

Another type of property that has been declared to be free from creditors is property held in the custody of the law.<sup>253</sup> Property *in custodia legis* denotes status of property when the court has appointed a custodian of the funds or property. The court has effectively taken the property from the control of the litigants.<sup>254</sup> The policy behind exempting such property from execution is to prevent any confusion or interference with a court's jurisdiction over subject matter.<sup>255</sup> Such confusion or interference may occur when a writ of execution is issued by one court against the same property over which another court has appointed a custodian. If this situation arises, the court which ordered the receivership may enjoin the writ of execution to avoid undue delay and confusion.<sup>256</sup>

The exempt status of property *in custodia legis* from execution by credi-

---

the proper court whether it be money or property, and any sale or execution not issued under the court will be voided.

250. *Littlefield v. Ungren*, 206 S.W.2d 152, 156 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.).

251. *Id.* at 156; *accord*, *Meek v. Republic Nat'l Bank & Trust Co.*, 9 F. Supp. 651, 657 (S.D. Tex. 1935). This decision was modified in *Wallace v. Republic Nat'l Bank & Trust Co.*, 80 F.2d 787, 790 (5th Cir.), *cert. denied*, 298 U.S. 683 (1936); *Lemmel v. Pauska*, 54 Tex. 505, 509 (1881); *McGriff v. Hazle*, 201 S.W.2d 92, 95 (Tex. Civ. App.—Eastland 1947, no writ). *See also* TEX. PROBATE CODE ANN. § 37 (Supp. 1974).

252. *Lozano v. Guerra*, 140 S.W.2d 587, 589 (Tex. Civ. App.—San Antonio 1940, no writ). The court stated in *Lozano* that the purchaser at an execution sale is charged with notice of any indebtedness of the debtor's estate, and the purchaser takes only what interest the debtor possessed. *Id.* at 589; *accord*, *Bell v. Read*, 56 S.W. 584, 585 (Tex. Civ. App. 1900, no writ).

253. *Challenge Co. v. Sartin*, 260 S.W. 313 (Tex. Civ. App.—Dallas 1924, no writ); *Pruett v. Fortenberry*, 254 S.W. 592, 594 (Tex. Civ. App.—Galveston 1923, no writ).

254. *Texas Trunk Ry. v. Lewis*, 81 Tex. 1 (1891). In the *Lewis* case it was stated that "the title of the receiver is of the date at which it is ordered that a receiver be appointed." *Id.* at 8.

255. *Fielder v. Parker*, 119 S.W.2d 1089, 1094 (Tex. Civ. App.—Eastland 1938, no writ) (where property executed on was under receivership appointed by a different court than the one that issued the writ); *accord*, *Glenn v. Connell*, 74 S.W.2d 451, 454 (Tex. Civ. App.—Eastland 1934, no writ).

256. *Challenge Co. v. Sartin*, 260 S.W. 313, 314 (Tex. Civ. App.—Dallas 1925, no writ).

tors ends when the reason for controlling such property no longer exists.<sup>257</sup> The end of control by the court most frequently occurs when a decree is entered for distribution or when the representative of the funds or property in custody ceases to have any duties except making payments or returning property to entitled persons.<sup>258</sup> The excess funds remaining after the sale of property or money in the hands of a receiver cannot be executed upon,<sup>259</sup> but it has been held that the surplus funds in the possession of a sheriff can be garnished where the execution creditors have been satisfied.<sup>260</sup> The sheriff has no remaining duties to perform after the creditors have been paid and he holds the funds only in a private capacity.<sup>261</sup>

#### EQUITABLE INTERESTS IN REALTY AND LEASEHOLDS

At common law, equitable interests were not subject to execution for the simple reason that a writ of execution was issued only from courts of law.<sup>262</sup> Now equitable ownership in two types of real property interests—freeholds and leaseholds—may be subject to execution depending on the circumstances surrounding their equitable ownership.<sup>263</sup>

In *Jensen v. Wilkinson*,<sup>264</sup> the court pointed out that a mere equity in property, as distinguished from an equitable title to property, is not subject to execution.<sup>265</sup> A person who expects to inherit realty is an example of one who has a mere equity while a person who has a vested remainder in property has an equitable title to property subject to execution.<sup>266</sup> The common example of an equitable title to property is the sale of land under the doctrine of part performance.<sup>267</sup> Once the vendee has met the requirements

---

257. *Id.* at 314.

258. *Id.* at 314.

259. *Id.* at 313.

260. *Goodson v. Carr*, 428 S.W.2d 875, 879 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

261. *Id.* at 879.

262. *Glennay v. Crane*, 352 S.W.2d 773, 776 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

263. See *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 96, 26 S.W. 1044, 1045 (1894).

264. 133 S.W.2d 982 (Tex. Civ. App.—Galveston 1939, writ dismiss'd jdgmt cor.).

265. *Id.* at 986.

266. See *Caples v. Ward*, 107 Tex. 341, 343, 179 S.W. 856, 857 (1915) (vested remainder); *Hendricks v. Snediker*, 30 Tex. 292, 307-08 (1867) (mere equity in realty); *Ferguson v. Chapman*, 94 S.W.2d 593, 599 (Tex. Civ. App.—Eastland 1936, writ dismiss'd); cf. *Smith v. Whitfield*, 67 Tex. 124, 2 S.W. 822 (1886). Where an interest in personal property is contingent, such cannot be levied upon. A vested interest, such as life estates in personalty, however, are subject to execution sales. *Allen v. Russell*, 19 Tex. 87 (1857).

267. In *Merchants' Nat'l Bank v. Eustics*, 28 S.W. 227 (Tex. Civ. App. 1894, no writ) the court stated: "[A] subsequent parol agreement, accompanied with possession and payment of the purchase money, without evidence of the making of valuable improvements, would not be sufficient to confer such title . . . as would be subject to levy and sale . . ." *Id.* at 229.

under the doctrine, his interest in the real estate is subject to execution.<sup>268</sup> An equity in property is deemed non-executable to avoid confusion at an execution sale. Such a sale would not permit the purchaser to know what property he was bidding on, and the sheriff would not be able to designate any particular property that would be subject to the writ.<sup>269</sup> The uncertainty of the sale also often results in the creditor's failure to realize complete satisfaction of his judgment.<sup>270</sup>

A lease interest that is assignable may also be subject to execution.<sup>271</sup> In *Moser & Son v. Tucker & Co.*,<sup>272</sup> the court concluded that a fee simple estate was subject to sale against the debtor only if the debtor had authority to pass title to the property by his own act.<sup>273</sup> It logically follows that if a lessee has authority to assign his interest, then it is also subject to execution. It must be remembered, however, that under Texas law, this authority to assign can be achieved only through the landlord's consent unless there is a provision to the contrary in the lease agreement.<sup>274</sup>

#### UNDIVIDED INTERESTS

Undivided property interests in Texas may be levied upon and sold at an execution sale without subjecting the interests of the joint owners to partition.<sup>275</sup> When execution is to be had on a joint interest in land, notice of the sale is required to be given to the judgment debtor or the judgment

---

268. *Id.* at 229. See *Curlin v. Hendricks*, 35 Tex. 225 (1871); *Matula v. Lane*, 56 S.W. 112, 113 (Tex. Civ. App. 1900, no writ).

269. *Daugherty v. Cox's Adm'r.*, 13 Tex. 209, 213 (1854).

270. *Jensen v. Wilkinson*, 133 S.W.2d 982, 986 (Tex. Civ. App.—Galveston 1939, writ *dism'd jdgmt cor.*); *accord*, *Chase v. York County Sav. Bank*, 89 Tex. 316, 322, 36 S.W. 406, 409 (1896), *quoting* *Hendrick v. Snediker*, 30 Tex. 307 (1867); *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 96, 26 S.W. 1044, 1045 (1894); *Daugherty v. Cox's Adm'r.*, 13 Tex. 209, 213 (1854); *see* *O'Neal v. Clymer*, 61 S.W. 545, 547 (Tex. Civ. App. 1900, writ *dism'd*).

271. *Jensen v. Wilkinson*, 133 S.W.2d 982, 986 (Tex. Civ. App.—Galveston 1939, writ *dism'd jdgmt cor.*), *citing* *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 26 S.W. 1044 (1894). The court in *Jensen* also mentions that a possibility of reverter, if not subject to a voluntary sale, would not be subject to a forced sale on execution. *Id.* at 985.

272. 87 Tex. 94, 26 S.W. 1044 (1894).

273. *Id.* at 96, 26 S.W. at 1045; *accord*, *Shaw v. Frank*, 334 S.W.2d 476, 480 (Tex. Civ. App.—El Paso 1959, no writ). In *Moser*, it was "conceded that no property or interest in property is subject to sale under execution or like process, unless the debtor, if *sui juris*, has power to pass title to such property or interest in property by his own act." *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 96, 26 S.W. 1044, 1045 (1894); *accord*, *Glenny v. Crane*, 352 S.W.2d 773, 777 (Tex. Civ. App.—Houston 1961, writ *ref'd n.r.e.*).

274. TEX. REV. CIV. STAT. ANN. art. 5237 (1962) prevents assignments without the permission of the landlord. Execution sale would have the effect of creating an assignment without the consent of the landlord, constituting a void sale.

275. *Brown v. Renfro*, 63 Tex. 600, 603 (1885).

debtor's attorney,<sup>276</sup> and the land may be subjected to sale<sup>277</sup> even if the property is pending partition in another action.<sup>278</sup>

#### AGRICULTURAL PRODUCTS

When the real and personal property involved is used primarily for agricultural purposes, a judgment creditor is usually restricted to an execution upon the crops growing on the land. This restriction is based on two factors. First, the statutory exemptions of the farmer prevent his rural homestead from being subjected to execution and his equipment, classified as tools of his trade, is also exempt.<sup>279</sup> Second, the tight cash situation often affecting the farmer prevents execution upon his money. The farmer usually borrows from a local credit association and immediately places these funds into his farming operations. The creditor then is left with only one alternative; the levy and sale of the debtor's growing crops. The crops ready to be harvested and produced by annual cultivation are not considered part of the realty, but are considered to be chattels, capable of voluntary transfer, and may therefore be levied upon and sold at an execution sale.<sup>280</sup>

#### SURETY-PRINCIPAL PROPERTY

When the judgment debtor serves as principal in a principal-surety relationship, the judgment debtor's property must be subjected to execution first.<sup>281</sup> The surety's interest is also available to make up the balance of the

276. TEX. R. CIV. P. 647.

277. *Braden v. Gose*, 57 Tex. 37, 42 (1882); *Sharp v. Yniguez*, 324 S.W.2d 291, 294 (Tex. Civ. App.—Amarillo 1959, no writ).

278. *Brown v. Renfro*, 63 Tex. 600, 603 (1885). The most common undivided interest in Texas, community property, may also be subject to sale, while the separate property of either spouse remains exempt from execution creditors of the other spouse. *Braden v. Gose*, 57 Tex. 37, 41 (1882); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. Sup. 1970). See also McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers*, in CREDITORS' RIGHTS IN TEXAS 330 (J. McKnight ed. 1963). Partition has also been held unnecessary to execute upon an undivided remainder interest owned by the judgment debtor. *Turner v. Miller*, 255 S.W. 237, 238 (Tex. Civ. App.—Amarillo 1923, no writ). In *Turner*, the court held that the only requirement is that the remainder be vested at the time of levy and sale.

279. TEX. REV. CIV. STAT. ANN. arts. 3832, 3833 (1966 & Supp. 1974). See also McKnight, *Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 56 (J. McKnight ed. 1963).

280. *Willis v. Moore*, 59 Tex. 628, 637 (1883). The Texas Supreme Court determined a method to show whose interests are being executed upon when crops are taken in satisfaction of a debt by execution during land sale transaction. If there has been a severance of the growing crops from the land sold, then the sale does not pass title to the crops. Thus, execution on crops may still be valid even when the debtor does not own the land from which the crops were taken. *Id.* at 639; *accord*, *Gulf Stream Realty Co. v. Monte Alto Citrus Ass'n*, 253 S.W.2d 933, 936 (Tex. Civ. App.—San Antonio 1952, writ ref'd); *Ellis v. Bingham*, 150 S.W. 602, 603 (Tex. Civ. App.—Texarkana 1912, no writ).

281. TEX. REV. CIV. STAT. ANN. art. 3786 (1966).



amount shown in the writ of execution.<sup>282</sup> But if the surety's property is levied upon because of a lack of the principal's property, the judgment debtor is still not relieved of his obligation under the judgment.<sup>283</sup> The surety obtains all the rights of the execution creditor against the debtor. The surety is entitled to levy on the principal's property for the amount of all costs and payments.<sup>284</sup> In some instances there may be two or more sureties serving the same principal. If there is a co-surety, then the surety who is executed upon is also authorized to execute on both the co-surety's for his proportionate share of the judgment,<sup>285</sup> and the principal's property.

#### CORPORATE STOCK AND PARTNERSHIP PROPERTY

At common law, corporate shares were not subject to execution.<sup>286</sup> Under Article 8 of the Investment Securities Act, however, a stock certificate may be levied upon if the security instrument is actually seized by the officer authorized to make the attachment or levy.<sup>287</sup> The purpose of requiring that the stock certificate be actually seized is to eliminate any possible transfer of the security after execution.<sup>288</sup>

The corporate assets may not be subjected to execution by a creditor of a shareholder because the creditor cannot reach assets to which the debtor himself is not entitled.<sup>289</sup> Once the shareholder attains a right to receive corporate property or income in the form of dividends<sup>290</sup> or liquidation,<sup>291</sup> his property may be levied upon and sold.<sup>292</sup> However, when the "corporation is being used as a vehicle by which the owner conducts a fraudulent

282. See TEX. REV. CIV. STAT. ANN. art. 3786 (1966); TEX. BUS. & COMM. CODE ANN. § 34.03(a) (1968); *Kelso v. Pratt*, 26 Tex. 381 (1862).

283. TEX. BUS. & COMM. CODE ANN. § 34.04(a) (1968).

284. TEX. BUS. & COMM. CODE ANN. § 34.04(b)(1) (1968).

285. TEX. BUS. & COMM. CODE ANN. § 34.04(b)(2) (1968).

286. *Keating v. J. Stone & Sons Live Stock Co.*, 83 Tex. 467, 471, 18 S.W. 797, 798 (1892); *Menard v. Shaw*, 5 Tex. 334, 337 (1849). The Supreme Court, in *Combs v. Hodge*, 62 U.S. (21 How.) 397, 407 (1858), cited *Menard* to distinguish the transfer of stock from the delivery of ordinary chattels. See Rain, *Technical Observations Concerning the Pledge of Corporation Shares*, 30 TEXAS L. REV. 684, 712 (1952).

287. TEX. BUS. & COMM. CODE ANN. § 8.317(a) (1968); TEX. R. CIV. P. 641. In *Frost v. Davis*, 288 F.2d 497, 498-99 (5th Cir. 1961), the Court of Appeals for the Fifth Circuit held that stock of a foreign corporation may also be levied upon and sold if the actual certificate is seized. Injunctions are also provided by statute to obtain control of the security, but the security itself must be taken to achieve a valid levy upon the stock. TEX. BUS. & COMM. CODE ANN. § 8.317(b) (1968).

288. See *Combs v. Hodge*, 62 U.S. (21 How.) 397, 407 (1858).

289. McKnight, *Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 57 (J. McKnight ed. 1963), citing TEX. BUS. CORP. ACT ANN. art. 2.38(a) (1956).

290. TEX. BUS. CORP. ACT ANN. art. 2.38 (1956).

291. TEX. BUS. CORP. ACT ANN. arts. 2.40 (1956), 6.06 (Supp. 1974), 7.11 (1956). These provisions provide for partial liquidation (2.40), articles of dissolution (6.06), and depositing amounts due shareholders and creditors with the state treasurer (7.11).

292. McKnight, *Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 57 (J. McKnight ed. 1963).

scheme or promotional venture, the corporate fiction of said corporation may be disregarded, in order to circumvent fraud . . . ."<sup>293</sup>

Partnership property is not subject to execution for the benefit of the creditors of individual partners. It is, however, subject to the creditors of the partnership.<sup>294</sup> Of course, by definition, partnership creditors may execute on the partners' individual interest when the assets of the business have been exhausted.<sup>295</sup> Likewise an individual partner's creditor may levy on that specific partner's interest.<sup>296</sup>

#### FRAUDULENT TRANSFERS

According to the fraudulent transfer statutes,<sup>297</sup> "when an insolvent debtor, in payment of a pre-existing debt, delivers property in value in excess of the debt, thereby placing the surplus beyond the reach of creditors, the conveyance is fraudulent in law and void as to excess."<sup>298</sup> In addition to any transfer of real or personal property, the execution process itself has also been deemed void with respect to a creditor or purchaser who intends to delay or defraud another creditor.<sup>299</sup> This problem of the execution process inadvertently resulting in a fraudulent conveyance was addressed in *Security Loan Association v. Ward*.<sup>300</sup> The court stated that if a debtor has no other property subject to execution after he transfers his property to a creditor, then such transfer will be considered invalid as to an unsatisfied creditor of the transferor.<sup>301</sup> Therefore, before a creditor levies on the defendant's property, he should examine the possibility that the debtor may be or become insolvent upon execution, thereby rendering the complete process void.

The test used in *Ward* to determine whether the execution was fraudulent as to other creditors, however, may not always be relied upon. Article 24.02 of the Texas Business and Commerce Code, which invalidates conveyances made to defraud creditors, has no effect on a conveyance of exempt property.<sup>302</sup> Additionally, when an insolvent debtor disposes of his

293. *Irish v. Bahner*, 109 S.W.2d 1023, 1025 (Tex. Civ. App.—Dallas 1937, writ dismissed).

294. TEX. REV. CIV. STAT. ANN. art. 6132b, § 25(2)(c) (1970).

295. TEX. REV. CIV. STAT. ANN. art. 6132 b, § 18(1)(a) (1970).

296. TEX. R. CIV. P. 642.

297. TEX. BUS. & COMM. CODE ANN. §§ 24.01-24.05 (1968).

298. *Lee v. Emerson-Brantingham Implement Co.*, 222 S.W. 283, 284 (Tex. Civ. App.—Dallas 1920, no writ).

299. TEX. BUS. & COMM. CODE ANN. § 24.02(a) (1968).

300. 444 S.W.2d 366, 368 (Tex. Civ. App.—El Paso 1968, no writ).

301. *Id.* at 368.

302. *Wells v. Jamison*, 252 S.W. 1023, 1024 (Tex. Comm'n App. 1923, judgment adopted); *accord*, *Chandler v. Welborn*, 156 Tex. 312, 316, 294 S.W.2d 801, 805 (1956); *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 410 (Tex. Civ. App.—Amarillo 1970, writ refused n.r.e.); *Crow v. First Nat'l Bank*, 64 S.W.2d 377, 379 (Tex. Civ. App.—Waco 1933, writ refused).

assets in exchange for an exempt homestead, the courts have held this exchange not to be a fraud upon his creditors.<sup>303</sup>

#### MORTGAGED PROPERTY

Property which the judgment debtor has sold, mortgaged, or conveyed in trust is not liable to execution if the purchaser, mortgagee, or trustee identifies other property of the debtor sufficient in that county to satisfy the judgment.<sup>304</sup> If the debtor has no other property to satisfy the debt, and in the case of real property, the mortgagor has legal title, and the debtor's remaining interest is subject to execution.<sup>305</sup> Likewise, the mortgagor's equity of redemption in realty may be subjected to levy and sale.<sup>306</sup> Although the title to mortgaged property remains in the mortgagor, the title may be divested by foreclosure proceedings, at which time the mortgagor's interest in the land ceases,<sup>307</sup> the execution purchaser taking the mortgagor's interest subject to the lien created by the mortgage.<sup>308</sup>

The mortgagor's interest in personal property as well as the equity of redemption in mortgaged personalty may also be sold under execution.<sup>309</sup> The purchaser at an execution sale receives such an interest subject to any encumbrances existing thereon,<sup>310</sup> and he must comply with the conditions involved before he can take possession of the goods from any third party who holds them.<sup>311</sup> If a lienholder's rights are jeopardized by the execution sale, he may remedy the situation by acquiring a writ of injunction or sequestration. Although protection is given the lienholder, these writs do not affect the rights of the mortgagor's interest to be sold under execution.<sup>312</sup> The mortgaged property, under certain circumstances, may not be subject to exe-

303. *Bell v. Bealey*, 45 S.W. 401, 403 (Tex. Civ. App. 1898, no writ); *accord*, *Morris v. Morris*, 482 S.W.2d 400, 402 (Tex. Civ. App.—Waco 1972, no writ).

304. TEX. REV. CIV. STAT. ANN. art. 3792 (1966); *see In re Pierce Oil Co. v. Carroll*, 277 S.W. 220, 221 (Tex. Civ. App.—El Paso 1925, no writ).

305. *Ballard v. Anderson*, 18 Tex. 377, 386 (1857).

306. *Smothers v. Field, Thayer & Co.*, 65 Tex. 435, 439 (1886); *Fant Milling Co. v. May*, 240 S.W.2d 445, 451 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.) (dissenting opinion); *see Simmons Hardware Co. v. Kaufman & Runge*, 77 Tex. 131, 137, 8 S.W. 283, 287 (1888).

307. *Wilkins v. Bryarly*, 46 S.W. 266 (Tex. Civ. App. 1898, no writ).

308. *Wootton v. Wheeler*, 22 Tex. 338, 340 (1858).

309. *Garrity & Huey v. Thompson & Ohmstede*, 64 Tex. 597, 599 (1885) (mortgagor's interest in personal property); *Sparks v. Pace*, 60 Tex. 298, 299 (1883); *Raysor v. Reid & Smith*, 55 Tex. 266, 270 (1881) (equity of redemption in mortgaged personalty); *Wootton v. Wheeler*, 22 Tex. 338, 339 (1858); *Gillian v. Henderson*, 12 Tex. 47, 48 (1854); *Wright v. Henderson*, 12 Tex. 43, 44 (1854); *Beil v. Lebo*, 74 S.W.2d 187 (Tex. Civ. App.—San Antonio 1934, no writ); *Wilkerson v. Stasny & Holub*, 183 S.W. 1191, 1192 (Tex. Civ. App.—Austin 1916, no writ).

310. *Beil v. Lebo*, 74 S.W.2d 187 (Tex. Civ. App.—San Antonio 1934, no writ).

311. TEX. R. CIV. P. 643. This rule also applies to property in the possession of a pledgee, assignee, or mortgagee.

312. *Raysor v. Reid & Smith*, 55 Tex. 266, 271 (1881).

cution due to its being recognized as part of the debtor's homestead. In such cases, however, it should be remembered that the creditor-mortgagor still has available the remedy of foreclosure.<sup>313</sup>

While a mortgagor's interest may be executed upon, the vendor's interest in a vendor's lien is not subject to the execution process by the vendor's creditors.<sup>314</sup> The vendor has relinquished his legal title, and his equitable interest in rescission may not be levied upon and sold. The interest of the vendor is deemed non-executable even where the real estate contract calls for monthly payments with an execution of warranty deed upon completion of payments<sup>315</sup> or where there is an assignment of a vendor's interest to a third party.<sup>316</sup> The vendor's interest, however, can be levied upon and sold after rescission, if a rescission occurs.<sup>317</sup>

#### THE UNIFORM COMMERCIAL CODE AND EXECUTION

The Uniform Commercial Code does not specify the requirements for execution on personalty.<sup>318</sup> There are, however, general provisions which, by implication, sanction the use of execution when such process is desired.<sup>319</sup> Differences in state law frequently arise, especially in determination of when an execution lien attaches to personalty, and each state's execution statutes will govern the outcome.<sup>320</sup>

The Texas version of Article 9 of the UCC provides that the secured party after default, "may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."<sup>321</sup> Although the most common method of recovery is repossession after default,<sup>322</sup> cer-

313. *Low v. Tandy*, 70 Tex. 745, 748, 8 S.W. 620, 621 (1888). Here, the mortgagee unsuccessfully executed upon machinery which attached as a fixture to the realty (homestead), instead of foreclosing upon his mortgage.

314. *Todd & Hurley v. Garner*, 133 S.W. 314, 315 (Tex. Civ. App. 1910, writ ref'd).

315. *Hodgkinson v. United States*, 5 F.2d 628, 629 (5th Cir. 1925).

316. *Brotherton v. Anderson*, 66 S.W. 682, 683 (Tex. Civ. App. 1902, writ ref'd).

317. *Rutherford v. Mothershed*, 92 S.W. 1021, 1023 (Tex. Civ. App. 1906, writ ref'd).

318. See *Rudd, A Postscript Concerning The Uniform Commercial Code*, in *CREDITORS' RIGHTS IN TEXAS* (J. McKnight ed. 1963); J. WHITE & R. SUMMERS, *THE UNIFORM COMMERCIAL CODE* § 26-4, at 964 (1972).

319. *TEX. BUS. & COMM. CODE ANN.* §§ 9.311, 9.501 (1968). Under section 9.311, the debtor's rights in collateral may be sold through judicial process even though there may be a provision prohibiting or making the transfer a default. See *In re Adrian Research & Chem. Co. v. Kirkpatrick*, 269 F.2d 734 (3d Cir. 1959) where landlord caused judgment to be entered on tenant, creating a security interest in equipment. The landlord issued execution and levied on all of tenant's personal property.

320. See *Note, Creditors' Rights—Enforcing a Judgment—When is a Lien Created on Property of Judgment Debtor?* 45 KY. L.J. 304 (1956).

321. *TEX. BUS. & COMM. CODE ANN.* § 9.501(a) (1968); see *In re Adrian Research & Chem. Co. v. Kirkpatrick*, 269 F.2d 734 (3d Cir. 1959).

322. *TEX. BUS. & COMM. CODE ANN.* § 9.503 (1968); see *Godwin v. Stanley*, 331 S.W.2d 341, 342-43 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.).

tain disadvantages may arise from the use of this method.<sup>323</sup> First, the secured party may repossess his property without judicial process only when he can do so without a breach of the peace.<sup>324</sup> If peaceful repossession cannot be achieved, then levy and sale must be resorted to. Second, repossession only affects the collateral and if its sale does not satisfy the existing debt that it secures, the creditor must proceed to sue for a deficiency.<sup>325</sup> Execution, on the other hand, provides a more complete remedy in that if the collateral upon resale will prove insufficient to satisfy the debt, the creditor may turn to other property of the debtor.<sup>326</sup> Despite these disadvantages and the fact that the execution process is favorable to the creditor in that it is treated as a foreclosure of the security interest and relates back to the date of the perfection of the security interest in the collateral,<sup>327</sup> repossession still remains the most significant procedure in secured transactions.<sup>328</sup>

The Uniform Commercial Code states that the debtor's interest in a secured transaction may be subject to execution,<sup>329</sup> but it does not consider the question of whether the interest of a secured party may also be executable.<sup>330</sup> Under article 9, "a security interest is strictly ancillary to the underlying obligation"<sup>331</sup> which would prevent the use of the writ of execution.<sup>332</sup>

323. J. WHITE & R. SUMMERS, THE UNIFORM COMMERCIAL CODE § 26-4, at 964 (1972). In *Godwin v. Stanley*, 331 S.W.2d 341 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.), the court stated that "It is definitely determined in this state that a mortgagee cannot use force or violence to recover the property mortgaged but has a right to peaceably take the property or resort to his legal rights in taking the same." *Id.* at 342-43.

324. TEX. BUS. & COMM. CODE ANN. § 9.503 (1968); see *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174, 71 S.W. 275 (1903). For a discussion of the constitutionality of section 9.503 under the due process clause of the 14th amendment, see Hughes, *Are Creditor's Self-Help Remedies Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701 (1973).

325. J. WHITE & R. SUMMERS, THE UNIFORM COMMERCIAL CODE § 26-4, at 964 (1972).

326. *Id.* at 964. See also TEX. BUS. & COMM. CODE ANN. § 9.501(d) (1968) which provides:

If the security agreement covers both real and personal property, the secured party may proceed under this subchapter as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this subchapter do not apply.

327. TEX. BUS. & COMM. CODE ANN. § 9.501(e) (1968).

328. Repossession gives an adequate, quick means of relief while the procedure under the writ of execution is rarely used because of "court delay, search for non-exempt assets and sheriff's sale . . ." J. WHITE & R. SUMMERS, THE UNIFORM COMMERCIAL CODE § 26-4, at 964 (1972).

329. TEX. BUS. & COMM. CODE ANN. § 9.311 (1968); see *In re Adraian Research & Chem. Co. v. Kirkpatrick*, 269 F.2d 734 (3d Cir. 1959).

330. See Dugan, *Creditors' Post-Judgment Remedies: Part I*, 25 ALA. L.J. 175, 200-10 (1972).

331. *Id.* at 208.

332. *Id.* at 208.

Because of new definitions being given to security arrangements under the Code, the traditional view of executions on notes may have been abandoned.<sup>333</sup> For example, under the definitions of "chattel paper," the writing is evidenced by both a monetary obligation and a security interest.<sup>334</sup> The chattel paper is owed only to the holder in this situation. Therefore, there is an indication that an execution on the instrument itself will also be an execution on the underlying obligation of the note.<sup>335</sup> This alleviates any traditional notion that payment on a note will not necessarily act as payment on the underlying obligation.<sup>336</sup> It is settled, however, that negotiable instruments under the Uniform Commercial Code<sup>337</sup> are not subject to execution until they leave the hands of the maker and are delivered to the payee.<sup>338</sup> While in the hands of the maker, the instrument is deemed to have no vitality, and execution on such is worthless.<sup>339</sup>

Like the proceedings in garnishment, successful use of the writ of execution is dependent upon a strict and thorough adherence to the rules of procedure established by the Texas Legislature and the judiciary.

#### PROCEDURE IN EXECUTION

The Supreme Court established the primary authority for the issuance of a writ of execution by dictating that judgments shall be enforced by execution or other appropriate process.<sup>340</sup> A valid, final judgment which arises when the judgment debtor has waived or forfeited his right to move for a new trial or appeal is a necessary requisite for obtaining the writ.<sup>341</sup>

All writs of execution have a specified, finite lifespan, returnable to the issuing court within 30, 60, or 90 days as requested by the judgment creditor.<sup>342</sup> Once the return date has expired, the writ is without force or effect<sup>343</sup> and the sheriff's right to take and sell property thereafter is termi-

---

333. TEX. BUS. & COMM. CODE ANN. § 3.802 (1968). Here, the underlying security instrument and the money obligation are said to be one and the same. *Contra*, Taylor v. Gillean, 23 Tex. 508 (1859).

334. TEX. BUS. & COMM. CODE ANN. § 9.105(a)(2) (1968).

335. Dugan, *Creditors' Post-Judgment Remedies: Part I*, 25 ALA. L.J. 175, 208-09 (1972); see TEX. BUS. & COMM. CODE ANN. § 3.802(a)(2) (1968).

336. Dugan, *Creditors' Post-Judgment Remedies: Part I*, 25 ALA. L.J. 175 (1972). See Taylor v. Gillean, 23 Tex. 508, 516 (1859) for the traditional view on notes and accounts.

337. TEX. BUS. & COMM. CODE ANN. § 3.104(a) (1968).

338. Sheldon v. Stagg, 169 S.W.2d 550, 553 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.).

339. *Id.* at 553.

340. TEX. R. CIV. P. 621.

341. Danielson v. Northwestern Fuel Co., 55 F. 49 (8th Cir. 1893); McMillan v. McMillan, 67 S.W.2d 343 (Tex. Civ. App.—Dallas 1933, no writ).

342. TEX. R. CIV. P. 621.

343. Mitchell v. Ireland, 54 Tex. 301, 306 (1881); Hester v. Duprey, 46 Tex. 625, 627 (1877); Towns v. Harris, 13 Tex. 254, 257 (1855); Chance v. Pace, 151 S.W. 843,

nated.<sup>344</sup>

Texas Rule of Civil Procedure 629 establishes the necessary official form for a writ of execution.<sup>345</sup> One of the key elements of form is the proper identification of the judgment debtor, therefore, a failure to properly identify the debtor will render the execution void.<sup>346</sup> Once this requirement has been met, a writ will never be void unless the issuing court lacked power or jurisdiction to issue the writ.<sup>347</sup> Other defects and irregularities in the statutory form, however, such as the inclusion of excessive charges for cost of rendering the execution will only make the execution voidable.<sup>348</sup> If the debtor desires to contest a writ due to irregularities, this must be done within a reasonable time or the debtor's right to contest the writ will be deemed waived.<sup>349</sup>

To insure that a writ of execution is, in fact, based upon a final judgment, the court is prohibited from issuing the writ until 20 days have elapsed following the rendition of the judgment, provided that a supersedeas bond has not been filed and approved.<sup>350</sup> Strict adherence to this 20-day waiting period, however, is not mandatory. Any orders prematurely issued are considered merely voidable rather than void,<sup>351</sup> and in special circumstances, the creditor is allowed to seek issuance of the writ before the waiting period

845 (Tex. Civ. App.—Galveston 1912, no writ); *Reagan v. Evans*, 21 S.W. 427, 429 (Tex. Civ. App. 1893, no writ).

344. *Hester v. Duprey*, 46 Tex. 625, 627 (1877); *Young v. Smith*, 23 Tex. 584, 587 (1859); *Long v. Castaneda*, 475 S.W.2d 578, 583 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *Chance v. Pace*, 151 S.W. 843, 845 (Tex. Civ. App.—Galveston 1912, no writ).

345. TEX. R. CIV. P. 629. This Rule provides that the execution shall be: styled "State of Texas," addressed to any sheriff or constable, signed by the clerk or justice officially and bear the seal of the court. The execution shall require the officer to execute according to its terms. Additionally, it must describe the judgment stating the court, time, parties involved and include a bill of cost.

346. *Long v. Castaneda*, 475 S.W.2d 578, 583-84 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). *But cf.* *Cooke v. Avery*, 147 U.S. 375 (1893). The Court in *Cooke* held that the filing of an abstract based on an execution which was entered in the name of a company owned by the judgment debtor and did not name the individual debtor was not fatally deficient. *Id.* at 391.

347. *Houston Oil Co. v. Randolph*, 251 S.W. 794, 797 (Tex. Comm'n App. 1923, jdgmt adopted).

348. *Brown v. Bonougli*, 111 Tex. 275, 278, 232 S.W. 490, 493 (1921); *Houston Oil Co. v. Randolph*, 251 S.W. 794, 797 (Tex. Comm'n App. 1923, jdgmt adopted).

349. *Morris v. Hastings*, 70 Tex. 26, 28, 7 S.W. 649, 650 (1888); *Sydnor v. Roberts*, 13 Tex. 299, 308 (1855).

350. TEX. R. CIV. P. 627.

351. *Bogges v. Howard*, 40 Tex. 154, 159 (1874); *Sydnor v. Roberts*, 13 Tex. 299, 308 (1855); *Bradford v. Ferrell*, 381 S.W.2d 204, 205 (Tex. Civ. App.—Beaumont 1964, no writ); *South Falls Corp. v. Davenport*, 368 S.W.2d 695, 697 (Tex. Civ. App.—Dallas 1963, no writ); *Interstate Life Ins. Co. v. Arrington*, 307 S.W.2d 146, 148 (Tex. Civ. App.—Texarkana 1957, no writ). *But see* *Graham v. Thomas D. Murphy Co.*, 497 S.W.2d 639 (Tex. Civ. App.—Amarillo 1973, writ filed). The court in *Graham* stated that the 20-day rule under Rule 627 is superseded by the 10-day provision of

expires. Rule 628 allows issuance if the creditor believes that the defendant intends to secret or remove property subject to execution out of the county before the writ can issue. Improper application of this rule may not render the resulting sale void but merely voidable.<sup>352</sup> In seeking to have the writ of execution issued, the creditor, if difficulty arises, may also seek by writ of mandamus to have the clerk of the court compelled to perform the ministerial act of issuing the writ.<sup>353</sup>

The clerk of each court is required to maintain an execution docket which must specifically state the names of the parties, amount of judgment, amount due on the judgment, rate of interest above 6 percent, cost, date of issuance, to whom the writ was delivered and the date of its return.<sup>354</sup> This docket is an official record and the clerk's entry of a judgment in the docket is evidence of the fact that the writ was issued.<sup>355</sup> Entry of the writ on the execution docket, however, is not necessary to its validity if some other document such as a recorded deed from a sheriff's sale is in evidence.<sup>356</sup> It should be noted that one of the purposes of an execution docket is to establish a specific time when the writ was issued.<sup>357</sup> This method of determining the specific time the writ was issued is further augmented by Rule 636 which requires the officer receiving the writ to specify on the writ the hour and day it was received.<sup>358</sup>

The clerk of each court is required to deliver to the judgment creditor an abstract of the judgment indicating the date, amount and parties to the judgment.<sup>359</sup> The judgment creditor should then take this abstract to the county clerk who will record on it the day and hour it is received.<sup>360</sup> A distinction between the two records, that of the clerk of court and that of the county clerk, becomes necessary only in determining the priority of liens of multiple creditors. The specific time a judgment is recorded by the county

Rule 634 where an individual files a right of property suit claiming property owned by him in the possession of the judgment debtor. *Id.* at 641.

352. *House v. Robertson*, 89 Tex. 681, 686-87, 36 S.W. 251, 252 (1896); *Acrey v. Henslee*, 279 S.W.2d 925, 926 (Tex. Civ. App.—Texarkana 1955, no writ); *see* *Sydnor v. Roberts*, 13 Tex. 299, 308 (1855).

353. *Dunn v. Ligon*, 430 S.W.2d 704, 707 (Tex. Civ. App.—Corpus Christi 1968, no writ); *Richburg v. Baldwin*, 89 S.W.2d 851, 852 (Tex. Civ. App.—Dallas 1935, writ *dism'd*); *Kruegel v. Williams*, 153 S.W. 903, 904 (Tex. Civ. App.—Dallas 1913, writ *ref'd*).

354. TEX. R. CIV. P. 656; *see* TEX. REV. CIV. STAT. ANN. art. 5447 (Supp. 1974).

355. *Schleicher v. Markward*, 61 Tex. 99, 102 (1884); *Goggans v. Green*, 165 S.W. 2d 928, 929 (Tex. Civ. App.—Texarkana 1942, no writ).

356. *Holmes v. Coryell*, 58 Tex. 680, 686 (1883) *Bendy v. Carter*, 269 S.W. 1037, 1038 (Tex. Comm'n App. 1925, *jdgmt* adopted).

357. TEX. R. CIV. P. 656.

358. *See* TEX. REV. CIV. STAT. ANN. art. 3785 (1966) which was repealed in part by Rule 636.

359. TEX. REV. CIV. STAT. ANN. art. 5447 (Supp. 1974).

360. TEX. REV. CIV. STAT. ANN. art. 5448 (1958).



clerk is important since this operates to set the priority of the lien upon all the real property of the defendant in the county of recording.<sup>361</sup>

Unlike the creation of a lien upon real property, a lien upon all of the judgment debtor's personal property in a particular county is created at the time such personal property is levied upon by the officer.<sup>362</sup> The officer receiving the judgment is required to proceed without delay to levy on all property of the debtor subject to execution within the county.<sup>363</sup> Therefore, the priority of liens upon the personal property of the debtor depends upon the time of levy by the officer, not upon the time of filing of the abstract of judgment with the county clerk. Under Rule 637 the officer is also required to call on the defendant and ask him to point out the property to be levied upon. Failure of the officer to call on the defendant, however, will not void a sale or deed to the property.<sup>364</sup> Nevertheless, the officer is liable on his bond for failure to levy on or sell the defendant's property to the extent of the actual loss attributable to his breach of duty.<sup>365</sup>

The procedure that the officer must follow in actually levying upon the real or personal property of the judgment debtor is established by Rule 639.<sup>366</sup> The word "levy" means actual or constructive seizure by the officer and the bringing of the property described in the writ under the control and custody of the court.<sup>367</sup> An actual taking of a debtor's property in which the debtor did not have a possessory right may not stand as a legal taking<sup>368</sup> nor will

361. TEX. REV. CIV. STAT. ANN. art. 5449 (1958).

362. *Kanaman v. Hubbard*, 110 Tex. 560, 563, 222 S.W. 151, 152 (1920); *Herndon v. Cocke*, 138 S.W.2d 298, 300 (Tex. Civ. App.—El Paso 1940, no writ).

363. TEX. R. CIV. P. 637 states in part that the officer should first call on the defendant and have him point out property to be levied upon and the first levy shall be upon such designated property until the judgment is satisfied. If no property is designated the officer may levy upon any property of the defendant subject to execution.

364. *Beck v. Avondino*, 82 Tex. 314, 18 S.W. 690 (1891); *Sharp v. Yniguez*, 324 S.W.2d 291, 293 (Tex. Civ. App.—Amarillo 1959, no writ); *Borders v. Highsmith*, 252 S.W. 270, 274 (Tex. Civ. App.—Beaumont 1923, writ *dism'd*).

365. *Fant Milling Co. v. May*, 240 S.W.2d 445, 449 (Tex. Civ. App.—Dallas 1951, writ *ref'd nr.e.*); *Richardson v. Johnson Layne Coffee Co.*, 252 S.W. 253, 255 (Tex. Civ. App.—Dallas 1923, no writ); *Hale v. Bickett*, 78 S.W. 531 (Tex. Civ. App. 1904, no writ).

366. TEX. R. CIV. P. 639 provides that in order to make a levy on real property the officer must go upon the property itself and endorse the writ to that effect. To levy upon personal property the officer must take the property into his possession unless the personal property is of such a nature as to make actual possession impossible. If the defendant has an interest in personal property, but is not entitled to possession, the levy is made by giving notice to the person entitled to possession.

367. *Wilkinson v. Goree*, 18 F.2d 455, 456 (5th Cir. 1927); *Voelkel-McLain Co. v. First Nat'l Bank*, 296 S.W. 970, 972 (Tex. Civ. App.—Dallas 1927, no writ).

368. *Kimbrough v. Bevering*, 182 S.W. 403, 405 (Tex. Civ. App.—Fort Worth 1915, no writ). *But cf.* *Coulson v. Panhandle Nat'l Bank*, 54 F. 855 (5th Cir. 1893). The sheriff levied on the defendant's nonpossessory one-half interest in a flock of goats by shearing wool from one-half the flock. The court upheld this action as a valid exercise of power under the writ. *Id.* at 858.

posting notice of an attempt to levy be sufficient where actual physical possession was possible but not taken.<sup>369</sup> There is an exception, however, where the property is of such great weight, bulk, and immobility that the expense of moving would be prohibitive. Where the property of the debtor falls within the excepted category, the officer must perform some act which, if not for the immunity furnished by the writ, would constitute a trespass, such as going on the property, pointing out the property to be levied on and forbidding its removal by the defendant.<sup>370</sup>

Separate requirements have been established for providing notice of the sale of personal property and real property. Notice of the sale of the personal property of the judgment debtor is provided for in Rule 650. The time and place of the sale must be posted at the courthouse door of the county and at the place where the sale is to be made for 10 consecutive days before the sale is held.<sup>371</sup> The property itself must be exhibited at the sale except for stock in a joint stock company or an incorporated company or where the defendant has an interest in the property without a possessory right.<sup>372</sup> If the property is not exhibited at the sale and does not come within the excepted category, the sale is void.<sup>373</sup> The requirements for notice of the sale of real property are established in Rule 647.<sup>374</sup> Notice may

369. *Osborn v. Paul*, 27 S.W.2d 572, 573 (Tex. Civ. App.—Amarillo 1930, writ ref'd); *Burch v. Mounts*, 185 S.W. 889, 892 (Tex. Civ. App.—Amarillo 1916, writ ref'd). Possession is "the condition in which not only one's own dealing with the thing is physically possible, but every other person dealing with it is capable of being excluded." The officer must take the property in an "open, public, and unqualified manner as to appraise everybody that it has been taken in execution." *Id.* at 892.

370. *Portis v. Parker*, 8 Tex. 23, 25 (1852); *Bryan v. Bridges*, 6 Tex. 69, 81 (1851); *Beaurline v. Sinclair Ref. Co.*, 191 S.W.2d 774, 777 (Tex. Civ. App.—San Antonio 1945, writ ref'd n.r.e.); *Smith v. Harvey*, 104 S.W.2d 938, 940 (Tex. Civ. App.—San Antonio 1937, writ ref'd); *Burch v. Mounts*, 185 S.W. 889, 892 (Tex. Civ. App.—Amarillo 1916, writ ref'd); *Jones & Nixon v. First State Bank*, 140 S.W. 116, 117 (Tex. Civ. App.—Fort Worth), *aff'd*, 106 Tex. 572, 173 S.W. 202 (1915).

371. TEX. R. CIV. P. 650.

372. TEX. R. CIV. P. 649. The personal property of the defendant shall be offered for sale at the location where it was taken, at the county courthouse door, or at a place more convenient due to the nature of the property.

373. *Gunter & Summerfield v. Cobb*, 82 Tex. 598, 606, 17 S.W. 848, 851 (1891); *L.J. Tillery Oil Co. v. Snyder*, 42 S.W.2d 282, 284 (Tex. Civ. App.—Beaumont 1931, no writ); *Hopping v. Hicks*, 190 S.W. 1119, 1122 (Tex. Civ. App.—Amarillo 1916, writ ref'd); *George R. Dickinson Paper Co. v. Mail Pub. Co.*, 31 S.W. 1083 (Tex. Civ. App. 1895, no writ).

374. TEX. R. CIV. P. 647 provides that the time and place of sale will be advertised in a newspaper published in the county once a week, for 3 consecutive weeks before the sale. Notice shall contain a statement of authority, time of levy, and time and place of sale, a description of the property giving the number of acres, original survey, locality in the county and the common name. If the price of publication exceeds that amount authorized to be spent, the officer shall post written notice in five public places in the county, including the courthouse door, for at least 20 successive days before the sale. The officer shall also give the defendant, his agent or attorney written notice either in person or by mail.

be published in any newspaper published in the county and it is not necessary that the newspaper be one of general circulation.<sup>375</sup> If improper notice has been given, the defendant must make a timely objection or his right to notice will be deemed waived.<sup>376</sup> The failure of the officer to give proper notice merely renders the sale voidable and not void, subject to the defendant's timely objection.<sup>377</sup>

Once proper notice has been given to the judgment debtor, real property will be sold at the courthouse door of the county or at the place where the property is located if so ordered by the court.<sup>378</sup> If the execution sale is not made at the time, place or in the manner required by law, the sale is void.<sup>379</sup> A sale of land by a sheriff outside his county is void even if the land outside the county is contiguous to land owned by the debtor within the county.<sup>380</sup> A defective execution may be amended only before a sale; any sale made under an execution amended after the sale is void.<sup>381</sup>

Certain irregularities, such as failure to mention the proceeding which revived a judgment under which the sale in question was held, are deemed harmless errors which will not render the sale void.<sup>382</sup> Additionally, imperfections in the levy such as an insufficient description of the land sold may be cured by an accurate description in the sheriff's deed given at the sale of the land.<sup>383</sup> A purchaser at an execution sale is not bound and his purchase is not affected by irregularities committed by the officer making the sale as long as these irregularities are without the knowledge of the purchaser.<sup>384</sup> If the officer sells without authority, no title can pass, but if he fails to follow the authority he possesses, the title will pass and the injured party must pursue his remedy against the sheriff.<sup>385</sup>

---

375. *Saylors v. Wood*, 135 Tex. 267, 270, 140 S.W.2d 164, 165 (1940).

376. *Morris v. Hastings*, 70 Tex. 26, 28, 7 S.W. 649, 650 (1888).

377. *Polk v. Holland Hypotheek Bank*, 66 S.W.2d 1112, 1116 (Tex. Civ. App.—Beaumont 1933, no writ); *Holt v. Holt*, 59 S.W.2d 324, 327 (Tex. Civ. App.—Texarkana 1933, writ ref'd); *Hodges v. Commonwealth Bank & Trust Co.*, 44 S.W.2d 400, 402 (Tex. Civ. App.—San Antonio 1931, no writ).

378. Tex. R. Civ. P. 646(a).

379. *Moody's Heirs v. Moeller*, 72 Tex. 635, 638, 10 S.W. 727, 729 (1889); *Sinclair v. Stanley*, 64 Tex. 67, 72 (1885); *Casseday v. Norris*, 49 Tex. 613, 618 (1878); *Grace v. Garnett*, 38 Tex. 157, 159 (1873); *Howard v. North*, 5 Tex. 290, 309-10 (1849); *Neblett v. Slosson*, 223 S.W.2d 938, 940 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.).

380. *Short v. Hepburn*, 75 F. 113, 115 (5th Cir. 1896).

381. *Morris v. Balkham*, 75 Tex. 111, 113, 12 S.W. 970, 971 (1889). The judgment was obtained against H.W. Van Hogan and execution was issued against William Van Hogan. The court refused to allow the purchaser to amend the writ after the sale.

382. *Berly v. Sias*, 152 Tex. 176, 179, 255 S.W.2d 505, 507 (1953).

383. *Henderson v. Boyer*, 51 Tex. 336, 345-46 (1879); *Downs v. Wagnon*, 66 S.W. 2d 777, 778 (Tex. Civ. App.—Eastland 1933, writ disp'd).

384. *Howard v. North*, 5 Tex. 145, 154 (1849); *Stone v. King*, 154 S.W.2d 521, 523 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

385. *Howard v. North*, 5 Tex. 145, 153 (1849); *Stone v. King*, 154 S.W.2d 521, 523 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

There is some conflict as to whether or not inadequacy of price will void a sale. For example, in *Graves v. Griffin*<sup>386</sup> land was appraised at \$2,200 and sold for \$81. Since this was the only irregularity alleged by the judgment debtor, the court refused to avoid the sale for mere inadequacy of price.<sup>387</sup> In *Moore v. Miller*,<sup>388</sup> however, it was held that the showing of slight additional facts of fraud, irregularity or other circumstances calculated to prevent the property from being sold at its reasonable value, coupled with inadequacy of price, would be sufficient to allow a court to use its equity powers to avoid a sale.<sup>389</sup> The sale of an oil and gas lease worth \$3,400 for \$50 was avoided by the court in *Saylor v. Wood*<sup>390</sup> because the defendant proved he was ready and willing to pay the indebtedness at the time of the sale.<sup>391</sup>

Where a defendant's land is in a rural location he may divide the property into 50 acre lots and designate the order of sale.<sup>392</sup> This is a protective device afforded the defendant to avoid an excessive levy but his failure to take advantage of it offers no grounds to enjoin the sale.<sup>393</sup> If, however, the defendant avails himself of this option and the officer conducting the sale fails to sell the land in the designated lots, the sale is void.<sup>394</sup> Likewise, a defendant who owns land subject to execution within a town or city is permitted to have each tract or parcel sold separately unless the improvements on such lots prohibit their separate sale.<sup>395</sup> Because this is an optional and not a mandatory procedure, the failure to sell the lots separately or to divide the land into lots where the land was easily separated is an irregularity which makes the sale only voidable.<sup>396</sup>

---

386. 228 S.W. 913 (Tex. Comm'n App. 1921, jdgmt adopted).

387. *Id.* at 915; *accord*, *Allen v. Stephanes*, 18 Tex. 590, 598 (1857); *Sharp v. Yniguez*, 324 S.W.2d 291, 294 (Tex. Civ. App.—Amarillo 1959, no writ); *see* *Grace v. Garnett*, 38 Tex. 155, 160 (1873).

388. 155 S.W. (Tex. Civ. App.—San Antonio 1913, writ ref'd).

389. *Id.* at 576; *accord*, *Allen v. Stephanes*, 18 Tex. 590, 603 (1857); *see* *Peters v. Rice*, 157 S.W. 1181, 1182 (Tex. Civ. App.—Dallas 1913, writ ref'd) (land appraised at between \$12,000 and \$15,000 sold for \$40).

390. 120 S.W.2d 835 (Tex. Civ. App.—El Paso 1938), *aff'd*, 135 Tex. 267, 140 S.W. 2d 164 (1940).

391. *Id.* at 838; *accord*, *House v. Robertson*, 89 Tex. 681, 687, 36 S.W. 251, 252 (1896); *Taul v. Wright*, 45 Tex. 388, 394 (1876); *Nance v. Currey*, 257 S.W.2d 847, 849 (Tex. Civ. App.—Dallas 1953, no writ) (sale of land valued at \$175,000 for \$2500).

392. TEX. REV. CIV. STAT. ANN. art. 3807 (1966).

393. *Chandler v. Riley*, 210 S.W. 716, 720 (Tex. Civ. App.—Dallas 1919, no writ); *Dickinson v. Comstock*, 199 S.W. 863, 864 (Tex. Civ. App.—El Paso 1917, no writ). *But see* *Sharp v. Yniguez*, 324 S.W.2d 291, 293 (Tex. Civ. App.—Amarillo 1959, no writ); *Chandler v. Young*, 216 S.W. 485, 486 (Tex. Civ. App.—Austin 1919, no writ) (homestead exemption prevails even if it is not designated by the defendant).

394. *Mills v. Pitts*, 121 Tex. 196, 201, 48 S.W.2d 941, 942 (1932).

395. TEX. REV. CIV. STAT. ANN. art. 3806 (1966).

396. *Nance v. Currey*, 257 S.W.2d 847, 850 (Tex. Civ. App.—Dallas 1953, no writ); *Peters v. Rice*, 157 S.W. 1181, 1182 (Tex. Civ. App.—Dallas 1913, writ ref'd); *Moore v. Miller*, 155 S.W. 573, 577 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

The purchaser at a judgment sale acquires all right, title, interest and claim which the judgment debtor had in the property being sold.<sup>397</sup> This simply means that a purchaser can acquire no greater title than the judgment debtor held at the time of the sale.<sup>398</sup> Additionally, because the deed which the purchaser receives amounts to more than a quitclaim deed, he is in effect a bona fide purchaser as to possible defects in the title<sup>399</sup> such as unrecorded claims against the property. Although the statute specifies that the purchaser receives all of the defendant's estate, this has been interpreted to mean only that estate which was levied upon and appeared on the officer's endorsement to the writ.<sup>400</sup> A purchaser at a judgment sale is also deemed innocent and without notice to the same extent he would have been innocent and without notice had the debtor sold the property voluntarily.<sup>401</sup> For example, had there been an unrecorded executed contract for the sale of the property which was purchased at a judgment sale, the purchaser would take the property over the unrecorded contract.<sup>402</sup> The purchaser is charged only with notice of the defects appearing upon the face of the writ of execution or those discovered from an examination of the judgment on which the sale is based.<sup>403</sup>

If the purchaser at a judgment sale is unable or unwilling to pay the price bid, he becomes liable to the defendant for 20 percent of the value of the property as a penalty and he is also liable to the defendant for any loss suffered in the subsequent sale.<sup>404</sup> The penalty and liability for damages do not apply where the sheriff refuses to accept tender of payment<sup>405</sup> or when the property is taken away from the sheriff after the bid was made but before the sale is consummated.<sup>406</sup> If there is any surplus realized from the

397. TEX. REV. CIV. STAT. ANN. art. 3816 (1966).

398. *Triangle Supply Co. v. Fletcher*, 408 S.W.2d 765, 767 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.); *Jensen v. Wilkinson*, 133 S.W.2d 982, 984 (Tex. Civ. App.—Galveston 1939, writ dismiss'd jdgmt cor.); *Robinson v. Monning Dry Goods*, 211 S.W. 535, 537 (Tex. Civ. App.—Amarillo 1919, no writ); *Lippincott v. Taylor*, 135 S.W. 1070, 1072 (Tex. Civ. App. 1911, writ ref'd).

399. *Ward v. League*, 24 S.W. 986, 988 (Tex. Civ. App. 1894, no writ).

400. *Riordan v. Britton*, 69 Tex. 198, 204, 7 S.W. 50, 53 (1887); *Smoot v. Woods*, 363 S.W.2d 798, 801 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

401. TEX. REV. CIV. STAT. ANN. art. 3818 (1966).

402. *Linn v. Le Compte*, 47 Tex. 440 (1877).

403. *Spence v. State Nat'l Bank*, 294 S.W. 618, 622 (Tex. Civ. App.—El Paso 1927), *aff'd*, 5 S.W.2d 754 (Tex. Comm'n App. 1928); *accord*, *Harvey v. Humphreys*, 178 S.W. 2d 733, 739 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.); *Love v. Allday Supply Co.*, 106 S.W.2d 831, 832 (Tex. Civ. App.—Eastland 1937, no writ); *Lissner v. State Mortgage Corp.*, 29 S.W.2d 849, 853 (Tex. Civ. App.—San Antonio 1930, writ dismiss'd).

404. TEX. R. CIV. P. 652.

405. *Cameron v. Saathoff*, 342 S.W.2d 470, 472 (Tex. Civ. App.—San Antonio), *aff'd*, 162 Tex. 124, 345 S.W.2d 281 (1961).

406. *Archenhold Co. v. Schaefer*, 205 S.W. 139, 140 (Tex. Civ. App.—Austin 1918, no writ); *Borden v. Fahy*, 120 S.W. 564 (Tex. Civ. App. 1909, writ ref'd); *Towell v. Smith*, 55 S.W. 186 (Tex. Civ. App. 1900, no writ).

sale over the amount of the judgment, it is immediately paid to the judgment debtor.<sup>407</sup>

Once a judgment becomes final it has an initial life of 10 years. If within 10 years after the judgment was initially rendered by the court, the judgment creditor fails to execute on the judgment, the judgment becomes barred.<sup>408</sup> If, however, the creditor does have the execution issue on the judgment before the 10-year period expires, the judgment will remain effective for another 10 years beginning from the date the execution was issued by the court.<sup>409</sup> This simple procedure gives the judgment creditor an inexpensive remedy to keep his judgment alive and prolong its life indefinitely.<sup>410</sup> The judgment creditor, knowing that the judgment debtor has no property on the tax rolls of the specified county, may deliver the writ to the sheriff with the request that it be returned "*nulla bona*" in order to keep the judgment alive.<sup>411</sup>

Another method of prolonging the life of a judgment is provided by article 5532. A judgment may be extended for a 10-year period by the judgment creditor if he petitions the court which issued the judgment for a writ of *scire facias* or by bringing another action on the original debt.<sup>412</sup> Additionally, no judgment may become barred while it is being appealed since an appeal deprives the judgment of the necessary finality to sustain a writ of execution.<sup>413</sup>

There appears to be an inconsistency between article 5532 and article 3773 on the issue of dormancy. Originally, article 3773 provided that a judgment became dormant after 12 months and could be revived, for the remainder of the 10-year period from the date the judgment was rendered by the court, only by the use of the procedures prescribed by article 5532.<sup>414</sup> In 1933, however, article 3773 was amended to read that "if no execution is issued within 10 years after rendition of judgment the judgment shall be-

407. TEX. REV. CIV. STAT. ANN. art. 3827 (1966).

408. *Zummo v. Cotham*, 137 Tex. 517, 155 S.W.2d 600 (Tex. Comm'n App. 1941, opinion adopted); *Grant Lumber Co. v. Bell*, 302 S.W.2d 714, 717 (Tex. Civ. App.—Eastland 1957, writ ref'd); *Arroyo Colorado Nav. Dist. v. Young*, 285 S.W.2d 308 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

409. TEX. REV. CIV. STAT. ANN. art. 2451 (1971); TEX. REV. CIV. STAT. ANN. art. 3773 (1966).

410. *General Am. Life Ins. Co. v. Ramp*, 135 Tex. 84, 93, 138 S.W.2d 531, 536 (1940).

411. *Spencer & Co. v. Harris*, 171 S.W.2d 393, 395 (Tex. Civ. App.—Amarillo 1943, writ ref'd). This is merely a time saving device which allows the creditor to maintain his judgment without having the sheriff make a useless search of the county for property of the defendant.

412. TEX. REV. CIV. STAT. ANN. art. 5532 (1958).

413. *McDonald v. Ayres*, 242 S.W. 192, 195 (Tex. Comm'n App. 1922, jdgmt adopted).

414. TEX. REV. CIV. STAT. ANN. art. 5532 (1958); see Note, 31 TEXAS L. REV. 73, 74 (1952).

come *dormant* . . .".<sup>415</sup> The effect of this amendment was to destroy the concept of dormancy in Texas, despite the still-existing language in article 5532 to the effect that a judgment is dormant if no execution has issued within 12 months after rendition of the judgment. With the changes in article 3773, today a judgment in Texas is alive for 10 years and at any time during that 10-year period may be extended for another 10 years by having execution reissue or by the use of a writ of *scire facias* or by an action on the debt.<sup>416</sup> This position, adopted by the Texarkana Court of Civil Appeals in *Cox v. Nelson*,<sup>417</sup> was expressly approved by the Supreme Court in *Sanders v. Harder*.<sup>418</sup> Therefore, if the creditor fails to have his judgment revived by some method within 10 years from the date it is rendered by the court, then the recovery on that judgment is barred forever.<sup>419</sup>

### POST-JUDGMENT DISCOVERY

Although the discussion of the writ of execution points out that the issuance of a writ is the final action of a lawsuit, an attorney may find that despite his diligence in obtaining a valid issuance of the writ, he may still have to face the unhappy prospect of an unsatisfied judgment. This may occur when property subject to execution cannot be discovered and the writ is returned unsatisfied. The judgment creditor's attorney must then determine whether to withdraw from the contest with only a hollow victory in the form of a valid, but unsatisfied judgment, or to continue the contest further by engaging in post-judgment discovery proceedings.

Post-judgment proceedings begin with the filing of an abstract of judgment with the trial court.<sup>420</sup> The abstract operates as a lien upon real property and should be filed in any county where the judgment debtor possesses property or may acquire such property in the future. A writ of execution<sup>421</sup> should then be issued, and the results of the execution will determine whether or not further post-judgment proceedings are necessary. If there is prop-

415. TEX. REV. CIV. STAT. ANN. art. 3773 (1966).

416. The judgment lien also maintains its vitality and priority. TEX. REV. CIV. STAT. ANN. art. 5449 (1958).

417. 223 S.W.2d 84, 85 (Tex. Civ. App.—Texarkana 1949, writ ref'd); the court rejected a contention that article 5532 should prevail over article 3773 and stated that the opposite effect should be given where the two articles are in conflict. The court points out the intent of the legislature in amending 3773 was to avoid the unnecessary and useless expense of the revival methods set out in 5532. *Id.* at 86.

418. 148 Tex. 593, 595, 227 S.W.2d 206, 207 (1950) wherein the court stated: "Under the holding in the recent case of *Cox v. Nelson* . . . it appears that the judgment had not become dormant . . ."

419. Wilson, *The Dormant Judgment in Texas*, 2 BAYLOR L. REV. 421, 427 (1950); Comment, *Perpetuating the Force of Judgments and Judgment Liens in Texas*, 29 TEXAS L. REV. 530, 536 (1951).

420. See TEX. REV. CIV. STAT. ANN. arts. 5447, 5449, 5450, and 5451 (1958).

421. TEX. R. CIV. P. 621.

erty upon which the sheriff may execute to satisfy the judgment, discovery proceedings will not be necessary. The writ, however, is often returned unsatisfied,<sup>422</sup> and the judgment creditor must use certain discovery methods to find the debtor's assets.

#### POST-JUDGMENT DISCOVERY PRIOR TO RULE 621a

Prior to 1971 a judgment creditor with an unsatisfied execution was limited to the use of a bill of discovery pursuant to Rule 737 in his attempt to locate assets upon which he could execute. A bill of discovery used after a judgment has been rendered is often cumbersome, costly and ineffective because venue of the original suit does not control.<sup>423</sup> An independent suit must therefore be filed,<sup>424</sup> the debtor being entitled on a proper plea of privilege<sup>425</sup> to have a hearing on the bill transferred to the county of his residence.<sup>426</sup>

Although a bill of discovery *may* be used after a final judgment,<sup>427</sup> it is apparent that such was not its intended use.<sup>428</sup> The methods of discovery provided by the bill are limited to oral interrogatories before the court and the taking of the judgment debtor's oral deposition.<sup>429</sup> These limitations, the potential change of venue and the inherent costs which the judgment creditor is forced to incur in initiating a new suit, place the judgment debtor in a significantly favorable position in the proceedings. Judgments are often awarded to the plaintiff, but remain unsatisfied because the procedure necessary to discover the defendant's leviable assets is too burdensome for the plaintiff to undertake. To aid in the enforcement of judgments, the Texas Supreme Court has promulgated Rule 621a, effective January 1, 1971, which authorizes the use of *any* discovery proceeding otherwise permitted by the statutes.<sup>430</sup>

---

422. The sheriff will return the writ stating what he has done in pursuance of the requirements of the writ. TEX. R. CIV. P. 654. If the writ is returned "unsatisfied" it will state that the judgment debtor has no property subject to execution.

423. *Emmons v. Creditor's Fin. Servs.*, 492 S.W.2d 363, 365 (Tex. Civ. App.—Waco 1973, no writ).

424. *Loomis, Use of Rule 621a*, 35 TEX. B.J. 1149, 1150 (1972).

425. TEX. R. CIV. P. 86, 87, 88, and 89.

426. *Emmons v. Creditor's Fin. Servs.*, 492 S.W.2d 363, 375 (Tex. Civ. App.—Waco 1973, no writ).

427. *Id.* at 365.

428. *Loomis, Use of Rule 621a*, 35 TEX. B.J. 1149, 1150 (1972).

429. TEX. R. CIV. P. 737.

430. Whereas Rule 737 is limited to oral examination, Rule 621a provides for the use of written interrogatories, eliminating the necessity of the judgment debtor's personal appearance before the court. Discovery proceedings permitted by statute are TEX. R. CIV. P. 186a:

Any Party may take the testimony of any person, including a party, by deposition upon oral examination or written questions for the purpose of discovery . . . .  
TEX. R. CIV. P. 167:

Upon motion . . . showing good cause . . . the court . . . may order any party:



## POST-JUDGMENT DISCOVERY UNDER RULE 621a

The discovery proceedings provided by Rule 621a have two distinct advantages over those provided by the bill of discovery under Rule 737. First, Rule 621a provides that the post-judgment proceedings may be brought under the same suit in which the judgment was rendered, therefore eliminating the change of venue problem and the lengthy time period between the rendering of the judgment and the recovery by the plaintiff. Second, any method of discovery which may be used in pretrial proceedings may also be used in post-judgment actions. Under Rule 737 answers are limited to oral depositions and the appearance of the debtor before the court. Rule 621a, however, provides for the use of written interrogatories by a judgment creditor, thereby enabling the discovery to be made more quickly and efficiently as there is no immediate need for a court appearance, court stenographer, etc. The use of 621a is governed by Rule 168, which establishes the basic requirements for the use of written interrogatories,<sup>431</sup> and by Rules 21a and 21b, which provide the requirements for notice to the other party.<sup>432</sup>

Procedure under Rule 621a is relatively simple, especially if the debtor is receptive to the discovery. Immediately after the rendition of the judgment,<sup>433</sup> the judgment creditor should submit written interrogatories to the

---

(1) To produce and permit the inspection and copying or photographing . . . of . . . : (a) any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action . . . .

TEX. R. CIV. P. 168:

At any time after a party has made appearance in the cause, or time therefor elapsed, any other party may serve upon such party written interrogatories to be answered by the party served . . . .

431. The basic requirements for the use of written interrogatories are:

[A]ny other party may serve upon such party written interrogatories to be answered by the party served . . . .

Whenever a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless delivery to the party himself is ordered by the court. True copies of the interrogatories and of any answers shall be served on all other parties or their attorneys at the time that any interrogatories or answers are served, and a true copy of each shall be promptly filed in the clerk's office together with proof of service thereof under the provisions of Rules 21a and 21b.

TEX. R. CIV. P. 168.

432. The basic requirements for notice to other parties are:

Every notice required by these rules . . . may be served by delivering a copy . . . to the party to be served, or his duly authorized agent, or his attorney . . . either in person or by registered mail . . . . Service by mail shall be complete upon deposit of the paper, enclosed in a post-paid, properly addressed wrapper, in a post office or official depository.

TEX. R. CIV. P. 21a. Additionally, TEX. R. CIV. P. 21b provides that "such notice or service may also be had by certified mail."

433. It has been suggested that interrogatories should be served before the judgment is finalized. Loomis, *Use of Rule 621a*, 35 TEX. B.J. 1149, 1150 (1972).

judgment debtor.<sup>434</sup> If the interrogatories are mailed, which is usually the most convenient method for the creditor, the debtor is allowed 13 days to object to them<sup>435</sup> and at least 18 days in which to answer.<sup>436</sup> If the answers are not received or objected to within the appropriate time limits, the creditor should submit to the court a motion to compel answers. If the motion is granted, a hearing will be set and the judgment debtor then has the opportunity to present his reasons for failing to answer.<sup>437</sup> If the debtor refuses to comply with the order, the creditor may, by use of a subpoena, compel the debtor to appear and produce records which will aid the creditor in his discovery.<sup>438</sup> If the debtor appears but refuses to answer or produce the desired items, he may be charged with contempt.<sup>439</sup> Should the debtor not appear for the hearing, an order of arrest and attachment<sup>440</sup> is prepared, ordering the sheriff to bring the debtor before the court where he will answer for contempt.<sup>441</sup> The debtor may then either answer the interrogatories or refuse to answer and accept instead a fine or jail sentence. If the debtor answers the creditor's interrogatories, the creditor can use the answers to pursue collection of his judgment in ancillary proceedings such as garnishment and attachment. If the debtor steadfastly refuses to answer, the credi-

---

434. TEX. R. CIV. P. 168. If the judgment debtor has retained his counsel, service of the interrogatories and answers to interrogatories shall be made upon the attorney unless delivery to the debtor is ordered by the court. *Id.*

435. The 13-day period is calculated by combining the provisions of TEX. R. CIV. P. 168 and 21a which are as follows:

Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time.

TEX. R. CIV. P. 168.

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

TEX. R. CIV. P. 21a.

436. This 18-day period is calculated by combining the provisions of TEX. R. CIV. P. 168 and 21a concerning the time allotted for answering interrogatories. Rule 168 provides:

The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories which specified time shall not be less than 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time.

437. TEX. R. CIV. P. 215a.

438. TEX. R. CIV. P. 201.

439. TEX. R. CIV. P. 215a(b).

440. The order for attachment is prepared for the court's signature and provides:

Attachment issue herein for the said \_\_\_\_\_ (party) directed to any sheriff or constable within the State of Texas requiring such officer at the time of the execution thereof to serve upon the said \_\_\_\_\_ (party) a certified copy of this order and to arrest the said \_\_\_\_\_ (party) and bring him personally before the court (at an appointed time) (or instanter) to answer for said contempt against the court.

Loomis, *Use of Rule 621a*, 35 TEX. B.J. 1149, 1150 (1972).

441. TEX. R. CIV. P. 215a.

tor is in no better nor worse position than he was when he received the favorable judgment at the principal trial.<sup>442</sup>

The debtor is protected from an unreasonable use of the discovery process in that he is granted two opportunities to refuse to answer: one after the issuance of the original interrogatories, and another subsequent to the court's granting of the motion to compel answers. As Rule 621a provides that the creditor may use discovery in any manner "provided by the rules," the debtor is protected by these rules and the creditor must abide by them.<sup>443</sup>

A judgment creditor, previously limited to a bill of discovery, may now use written interrogatories in his efforts to secure collection of the judgment he has been awarded. He does not have to initiate a new suit and thereby avoids the costs and delays inherent in a bill of discovery. These two advantages may ultimately result in the elimination of the bill of discovery as an element of post-judgment proceedings.

It is apparent that the procedure necessary for the creditor to discover leivable assets of the debtor can still be lengthy if the debtor refuses to answer the interrogatories. The creditor must decide whether he wishes to pursue the matter any further than the filing of an abstract of judgment and issuing the original writ of execution. The amount of the judgment will certainly influence this decision, but the creditor should realize that he can only profit from the use of the interrogatories, a factor which could call for their use as an automatic part of the creditor's trial procedure.

### CONCLUSION

In this symposium the authors have presented a review of available Texas post-judgment remedies. Our primary goal has been to assist the practicing attorney in the collection and satisfaction of otherwise unsatisfied judgments. Successful post-judgment collection is dependent upon a strict adherence to statutory and judicial requisites. The symposium has traced these requirements and placed them into orderly perspective for the practitioner.

Because the nation's economy is significantly based upon credit, it is essential to appreciate the importance of collection devices. In Texas, however, few comprehensive articles have considered the practical methods of pursuing post-judgment remedies. We hope to have generated a better understanding of this specific field of creditors' rights.

---

442. TEX. R. CIV. P. 168, 170(c) and 215a(a) make provisions that reasonable expenses may be awarded to the party who has to take additional steps to recover his judgment because of the defendant-debtor's refusal to answer. The court under these rules may also grant attorney's fees.

443. See TEX. R. CIV. P. 168, 186b.